Renegotiation and Adaptation of long-term mining concessions in Zambia

By

McQueen Zenzo Zaza

Student number: 17400971

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Prepared under the supervision of

Dr Femi Oluyeju

Faculty of Law, University of Pretoria

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DECLARATION

I declare that this Mini-Dissertation which is hereby submitted for the award of Legum Magister (LL.M) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, Faculty of Law, University of Pretoria, is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

Signed: ___________________________

McQueen Zenzo Zaza

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SUMMARY OF THE DISSERTATION

Host countries particularly developing countries do not usually have financial capacity needed to explore, exploit and develop projects involving natural resources extraction. More often than not, they do not even have the technology needed for the proper execution of such complicated ventures. As a result, they would want a private partner to take up the risks and challenges associated with natural resources extraction. Host countries especially developing countries compete among themselves for foreign investors. Accordingly, they would enact competitive investments codes with very generous incentives to attract foreign investors. The investment codes would include but not limited to incentives such as tax stability clauses, tax holidays, expatriation of funds, compensation for expropriation, zero import duties and many more.

Foreign investors would do their own viability studies by comparing investment codes for different countries before they settle for one particular country. At this point, they are in the stronger negotiating position than Host countries who are desperate and in a hurry for foreign investors to develop the mining, gas or petroleum sector. Thus, they would demand for more incentives and investment guarantees to safeguard their investment.

At this stage, foreign investors would demand the inclusion of stabilisation clauses in concessions in order to tie the legislative hands of the host country from enacting laws or regulations that have the potential of varying the terms agreed by the contracting parties. By so doing, the concession is insulated from subsequent changes in the law or regulation thereby making the law applicable to be the law or policies that existed at the entry of contract. In this way, any new laws or regulations passed by the host country during the life period of the concession, will not apply to the contract.

Host states find the insertion of stabilisation clauses in long-term concessions as an infringement of their permanent sovereignty over natural resources. They argue that stabilisation clauses take away their sovereign prerogatives hence they are invalid since states have permanent sovereignty over their natural resources. Foreign investors, on the other hand, argue that the mere fact that states agree to the insertion of stability clauses in

concessions, that in itself is an exercise of sovereignty and willingness to be bound by the terms in that concession. They insist that Host state are bound to perform their concessional obligations and not unilaterally change its laws or regulations inconsistent with the concession. They, therefore, insist on the principle of sanctity of contract (*pacta sunt servanda*). There is therefore, a constant conflict between the concept of *pacta sunt servanda* and permanent sovereignty over natural resources regarding the insertion of stability clauses. It must be noted that breaching a stabilisation clause results in the breaching party compensating the affected party. Compensation is usually monetary. These clauses are very rigid and do not offer any solutions to changes in circumstances that may render performance of contract onerous. There is therefore need for a flexible and amendable approach to long-term concessions. This may be achievable through insertion of renegotiation and adaptation clauses.

The flexibility of long-term concessions is an advantage to both a foreign investor and Host country for mitigating the effect of an unanticipated event which undesirably affects the feasibility of the concession. Nevertheless, the principle of sanctity of contract has frequently prompted rigid provisions with the fundamental justification that this gives investors security and predictability of contract. On the other hand, by virtue of the principle of vital change of circumstances, novel drift has come to life in the arena of extractive industries including the insertion in the concession a clause which provides for renegotiation or adaptation of the existing concession.

The aim of the flexible mechanism is that contracting parties should not be indebted to carry on a performance which would be unfairly onerous or unproductive due to a supervening unfettered event. For these mechanisms to be effective, contracting parties must define clearly the trigger events. Not any event must prompt a renegotiation of the provisions of the concession otherwise that might lead to contractual instability. Suffice to mention that renegotiation of the provisions of concession can happen even in the absence of an express provision to that effect. Parties in an agreement that does not expressly provide for a renegotiation clause, may resort to look at other provisions of the concession such as law applicable, force majeure and hardship clauses as a starting point.

In the Zambian context, the Government of Zambia in 2008 cancelled all the development agreements she had signed in 1997 through 2000 by enacting the 2008 Act. These development agreements contained provisions for tax stability clauses which were binding on the government covering the period 15 to 20 years. The government of Zambia cancelled the development agreements because it felt that it was not benefiting from raw deals it had entered into. The cancellation resulted into huge conflicts between the government and the mining companies. Some mining companies reduced labour and scaled down operations while others refused to pay the introduced tax regime. This resulted in the Government losing revenue. This could have been avoided if the contracting parties had engaged in renegotiation of the terms of the concessions.

The study has established that the development agreements did not make provision for renegotiation and adaptation clauses. The foregoing however doesn't stop parties from renegotiating the terms of the agreements. In the absence of express provision for renegotiation, parties can look at other provisions of the agreements such as applicable law, force majeure and hardship clauses. The development agreements contain an applicable law clause which makes reference to Zambian law and International Law. International law recognises the changes in circumstances that may ravage the concession thereby making it onerous for parties to perform their obligations. In such instances, International Law permits a party or parties to the concession to withdraw performance or renegotiate the terms. Thus, the Zambian government and mining companies should have taken this root.

Premised on the findings above highlighted, the recommendation of the dissertation is that the Zambian Government and the mining companies should renegotiate the cancelled development agreements based on International principles. The mere fact that the parties have continued to relate based on the development agreements despite their cancellation in 2008 shows that there is basis for renegotiation in order to formalise their contractual relationship. The study further recommends that future mining development agreements should make provision for renegotiation and adaptation clauses with clearly defined trigger events.

ABBREVIATIONS AND ACRONYMS

AAC: Anglo America Corporation

AMINOIL: American Independent Oil Company

AGIP: Azienda Generale Italiana Petroli

CISG: Convention of International Sale of Goods

GRZ: Government of the Republic of Zambia

GDP: Gross Domestic Product

HIPC: Heavily Indebted Poor Country

ICJ: International Court of Justice

ICSID: The International Centre for Settlement of Investment Disputes

IFC: International Finance Corporation

IMF: International Monetary Fund

LIAMCO: Libyan American Oil Company

MMD: Movement for Multi-Party Democracy

NIOC: National Iranian Oil Company

NGOs: Non-Governmental Organisations

OPIC: Overseas Private Investment Corporation

PCIJ: Permanent Court of International Justice

RST: Roan Section Trust

SRSG: Secretary-General for business and human rights

Texaco: The Texas Company

UNCITRAL: The United Nations Commission on International Trade Law

UNIDROIT: International Institute for the Unification of Private Law

ZCCM: Zambia Consolidated Copper Mines

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the study

Zambia is one of the main producers of copper worldwide, and, after the Democratic Republic of Congo, the second largest producer of copper in Africa.[1] Additionally, Zambia is a mono-economy depending heavily on mining resources as source of economic survival.[2] Copper Mining and, indeed, mining in general in Zambia plays a significant role as it contributes critically to Government revenue as well as the creation of formal employment either directly or indirectly. The World Bank report, dated 17 July 2016, and entitled 'How can Zambia benefit more from mining?*'* stated, 'it accounts for 12% of the economy's Gross Domestic Product (GDP) and 70% of total export value.'[3] Zambia's economy, therefore, relies very considerably on mining as one of its fundamental pillars for economic growth.

Copper mining in Zambia has undergone three stages which neatly follow the path of its political history. Immediately after she gained her independence, Zambia was a multi-party democratic state. In 1975, she ceased to be a multi-party democracy and became a one-party participatory democracy. In 1990, however, she reverted to a multi-party democratic system of governance. It is this same political pattern that was followed by the copper mining regime in Zambia.

The first stage was the era immediately after colonialism and in the aftermath of independence. During this stage, the mining regime in Zambia was in private hands. The mining industry was primarily in the hands of the Roan Section Trust (RST) and the Anglo America Corporation (AAC). It is worth noting that, during this period, mining rights were vested in the British South African Company, consequently mineral royalties accrued to the company.[4] In 1969, the then Zambian administration under President Kenneth Kaunda

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[1] https://www.german-energy-solutions.de/GES/Redaktion/DE/Publikationen/Marktanalysen/2016/studie_2016_subsector-solar-in-mining-zambia.pdf?__blob=publicationFile&v=6 . (accessed on 25 March 2017)

[2] SP Ng'ambi 'Resource Nationalisation in International Investment Law' (2016) 99.

[3] http://www.worldbank.org/en/news/feature/2016/07/18/how-can-zambia-benefit-more-from-mining . (accessed on 25 March 20017)

[4] J Lungu 'The Politics of Reforming Zambia's Mining Tax Regime' (2009) 8 *Southern Africa Resources Watch* 11. http://www.sarwatch.org/sarwadocs/Politics_Reforming_Zambia_Mining_Tax_Regime.pdf (accessed 19 March 2017).

"through the Matero reforms obtained [a] majority shareholding in the mining companies. Mineral rights also reverted to the state."[5]

The second stage happened when the then President of Zambia, Kenneth Kaunda, and his administration expropriated the assets of the RST and the AAC. The two mining giants were nationalised under the philosophy of humanism and were then incorporated into a single corporate body called the Zambia Consolidated Copper Mines (ZCCM).

Between the 1980s and 1990s, the Zambian mining regime went through a tough time as it saw the collapse of copper prices on the world metal market.[6] The foregoing, coupled with the lack of investment in mining consumables and machinery, resulted in the under performance of the then State-owned ZCCM. In fact, the state-owned mines started making serious losses of up to US$ 1 million per day and this meant a reduction in the revenues of the Zambian Government.[7] This, in turn, resulted in the company's going from being a prized asset to being a loss-making company and so a burden on the Government treasury. This, consequently, forced the Government to privatize the mines.

In 1990 the then Kenneth Kaunda government changed from being a one-party state back to a multi-party democratic state. This was due to internal political pressure in the country coupled with conditions for loans imposed by the World Bank and the International Monetary Fund (IMF). The World Bank and the IMF pressurised the then Zambian government to privatise mining as they had become a strain on the government treasury.

In 1991, the Kenneth Kaunda government was defeated in a general election that saw the coming into power of the Movement of Multi-Party Democracy (MMD). One of the campaign promises of the MMD was that it was going to liberalize the economy. It, further, promised to sell the mines to foreign investors.

In 1996, Zambia qualified for the World Bank's Heavily Indebted Poor Country (HIPC) initiative. This meant that she would have some debt relief if she cleared some of her financial burdens.[8]Under the HIPC completion scheme, Zambia received more pressure to

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[5] Lungu (n 4 above) 11. See also Kaunda Kenneth 'Towards complete independence' (1969).

[6] J Lungu 'Copper Mining Agreements in Zambia: renegotiation or law reforms?' (2008) 35 *Review of African Political Economy* 404.

[7] Lungu (n 6 above) 404.

[8] Ng'ambi (n 2 above) 112.

privatize the mines. In addition, it was a condition precedent under this scheme that Zambia was obligated to establish a liberalised mining policy that was meant to attract foreign investors.[9] To facilitate the process of attracting foreign investors in Zambia, the government enacted the Mines and Minerals Act1995 and the Investment Act 1993.[10] The 1993 Act was repealed and replaced by the Zambia Development Agency Act 11 of 2006 as amended by Act 1 of 2010. So, privatization was in the third stage of the development of the mining regime in Zambia.[11]

The Zambian government, thus, ventured into various development agreements with a number of mining giants for the development of the mining sector in from 1997 to 2000. The agreements were entered into on the basis of section 9 of the Mines and Mineral Act 1995. The underlying motivation was to attractive foreign investors to the mining sector in order to boost the then collapsing economy. One of the incentives promised to foreign investors for investing in the sector was a tax stability period ranging from 15 to 20 years with an undertaking by the government to compensate the investors fully and fairly in the event that it breached the tax stability clauses.[12]

Nevertheless, in the year 2008, the Government enacted the Mines and Minerals Development Act of 2008 which repealed and replaced the Mines and Minerals Act 1995. The essence of this Act was to unbundle and render obsolete the various development agreements that had been entered into by the government of Zambia from 1997 to 2000.[13] Critical to the new changes ushered by the Mines and Minerals Act of 2008 were taxes which were adjusted upwards. Some of the changes in the fiscal regime for the mining companies included:

- "Increasing the corporate tax from the current 25 percent to 30 percent;
- Increasing the mineral royalty tax from the current 0.6 percent to 3 percent;
- Introducing a withholding tax on interest, royalties, management fees and payments to affiliates or sub-contractors in the mining sector at 15 percent;

[9] Ng'ambi (n 2 above) 112.

[10] KK Mwenda 'Legal Aspect of Foreign Direct Investment in Zambia' (1999) 6 Murdoch University Electronic Journal of Law. http://www.murdoch.edu.au/elaw/issues/v6n4/mwenda64nf.html.

[11] Lungu (n 6 above) 405.

[12] http://www.minewatchzambia.com . (accessed 22 March 2017).

[13] https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/4133/pb7-mining+tax+in+zambia.pdf;jsessionid=FB14E366778B7ADF6FE07EE8FE9F9441?sequence=1 . (accessed 22 March 2017).

- Introducing a variable profit tax of up to 15 percent on taxable income which is above 8 percent of gross income;
- Introducing a windfall tax to be triggered at different price levels for different base metals. For copper, the windfall tax would be 25 percent when the copper price was between $2.50 to $3.00 per pound or $2500 to 3000 per tonne; 50 percent when the price was between $3.00 and $3.50 and 75 percent when the price exceeded $3.50.
- Capital allowances which are currently at 100 percent will now be 25 percent. Capital expenditures for new projects shall be ring fenced and become deductible only when the projects start production.
- The reference price on which these taxes will be based will be the price tenable at the London Metal exchange, Metal Bulletin or any other metal exchange market recognised by the Commissioner General of taxes."[14]

The aforesaid measures, 'according to then Minister of Finance, were expected to bring in an additional $415 million in revenue from the mining industry in 2008.'[15]

As if the above were not enough, in the year 2015 the Government repealed and replaced the Mines and Minerals Act of 2008 by the Mines and Mines Development Act of 2015. This 2015 Act similarly to the 2008 Act enhanced the taxes payable by the mines[16]. Under section 89 of the 2015 Act, the Government increased the payment of royalties on production minerals to 9%. By section 9 of the 2015 Act[17], the Government is empowered to "capture tax revenue immediately, even though the mine may still be several years from profitability – or may even be making a loss."[18]

This new development adversely affected the profitability of the mining sector which had already been hit by falling copper prices and power deficits owing to low-water levels in key hydro-power plants. In the face of this, the mines retrenched most of their labour force and suspended production. This, in turn, meant an enormous reduction in revenue contributions to the Government resulting in economic meltdown.[19] There is now a proposal

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[14] Lungu (n 4 above) 19. See also Ng'ambi (n 2 above) 124.

[15] Lungu (n 4 above) 19.

[16] http://www.manic.co.zm/wp-content/uploads/2016/11/Taxation-and-Mining-Investment-in-Zambia.pdf . (accessed on 18 March 2017)

[17] The Mines and Minerals Development Act 11 of 2015

[18] Royalties "are acknowledged to be a blunt instrument, in that they are not sensitive to market conditions, the cost profile, profitability or distinct circumstances of different mines. Royalties are regarded as a 'regressive' tax, as they fall hardest on those who are worse off. For example, two mines producing the same amount of copper will pay the same royalty, even though one may be producing at a loss, while the other is profitable." http://www.manic.co.zm/wp-content/uploads/2016/11/Taxation-and-Mining-Investment-in-Zambia.pdf (accessed 18 March 2017)

[19] http://www.sarwatch.org/sarwadocs/Politics_Reforming_Zambia_Mining_Tax_Regime.pdf . (accessed 19 March 2017).

by government to introduce a new Mines and Minerals Development Act 2017 to help address the mining tax impasse.

1.2 Research problem

The above-mentioned facts command deep reflection about the Government/foreign investor concessional association in the context of the development agreements. This rapport has frequently been characterised by continuous tautness between the Government and the foreign investor. The tension is as a result of the actions taken by Zambia when she decided unilaterally to change the mining tax laws and fiscal policy in breach of the tax stability clauses in the various development agreements she had entered into between 1997 and 2000. The Government and the mining companies have both held very strong views regarding the matter in *casu*.

From the standpoint of the government, contractual commitments cannot restrict its sovereign prerogatives. Sovereignty, according the government, ranks highly and is a natural consequence of statehood. A state cannot, therefore, be precluded, through contractual provisions, from changing its laws or regulations.[20] Consequently, as far as the interest of the public is concerned, the government cannot be barred from adjusting or, better still, terminating the development agreements.

The foregoing argument, from the foreign investor's perspective, is unacceptable as the development agreement binds both parties to fulfil their contractual obligations. Investors further contend that the general stabilisation and tax stability clauses must be respected and performed as agreed. This, according to the investor, does not mean that the government's sovereignty over its natural resources is taken away[21].

By nature, long-term concessions cover a number of years, usually for periods of many years, involve numerous parties, deal with highly complex technical and financial matters, and involve large sums of money.[22] Consequently, the parties in the negotiation process of these long-term agreements pursue contractual stability. Simultaneously, the contracting parties know that:

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[20] See DE Vielleville & BS Vasani 'Sovereignty over Natural Resources versus Rights Under Investment Contracts, which one Prevails?'(2008) *Transitional Dispute Management*.

[21] A Faruque 'Validity and Efficacy of Stabilisation Clause: Legal Protection vs Functional Value '(2006) 23 *Journal of International Arbitration* 322.

[22] JW Salacuse *The Three laws of International Investment* (2013) 276.

> during the long-time period covered by their agreement, many unforeseen political, economic, regulatory, and technical circumstances may arise to change the balance of benefits from the project that the parties had contemplated at the time of contract very considerably.[23]

Hence, long-term concessions are naturally susceptible to be affected by events not anticipated by the contracting parties at the onset of the contractual rapport.[24] In view of the foregoing, as contracting parties negotiate the terms of a concession, it is improbable that they proficiently assess and predict every potential supervening event on the concession "of factors such as the political situation, economic and social climate, geological and environmental conditions."[25] These events may change fundamentally during the term of a contract, thus adversely changing the economic benefits that contractual parties originally envisioned they would draw from the concession.[26] Consequently, the prolongation of the operation of the concession may then prove to be onerous or no longer worthwhile and eventually result in the end of the concession.[27]

So, it is imperative to seek a flexible and amendable approach in long-term concessions in order to cure the rigidity that stabilization clauses establish in investment concessions.[28]This may be realised by including renegotiation and adaption clauses in the development agreements, so enabling the contracting parties to revise or adjust their concessional association in order to lessen the changes in circumstances that may seriously affect the concession.[29] There is need, therefore, to balance the necessity of stability and flexibility in long-term investment concessions for the contract itself to authorize the contracting parties to revise key elements of their association upon the happening of specified events or circumstances.

The case of the renegotiation and adaptation of long-term concessions in Zambia raises the same kind of issues. The government brutally cancelled all the development

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[23] Salacuse (n 22 above) 281.

[24]KP Berger 'Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators'(2003) 36 *Vanderbilt Journal of Transnational Law* 1347.

[25]JW Salacuse 'Renegotiating International Project Agreements '(2000) 24 *Fordham International Law Journal* 1338. See also A Kolo and TW. Walde 'Renegotiation and Contract Adaptation in International Investment Projects Applicable Legal Principles and Industry Practices' (2000) 1 *The Journal of World Investment* 5.

[26] Kolo and Walde (n 25 above) 5.

[27] Kolo and Walde (n 25 above) 5.

[28] Salacuse (n 22 above) 281.

[29] Salacuse (n 22 above) 1338.

agreements she had signed with the different mining companies. This she did by enacting the 2008 Act which not only cancelled the development agreements but also introduced a new tax regime. The rationale was to increase the government's benefits from her natural resources. At the time, she felt constrained to change the mining tax regime because of the tax stability clauses which she had contractually committed herself to fulfil. The said development agreements did not contain any renegotiation clauses and so the Zambian government opted to breach them through legislation. Renegotiation of the development agreements would have been the most viable thing to do despite the fact that the concessions did not make provision for renegotiation in the event of changes in circumstances. [30] Scholarly work reveals that long-term concessions may be renegotiated even in the absence of a renegotiation and adaptation clauses. Contracting parties are to seek solace in the other provision of the concession which can allow for the renegotiation of the concessional terms. Such provisions include, but are not limited to, applicable law, hardship and *force majeure* clauses. It is imperative to note that the development agreements that the Zambian government had signed contained applicable law and *force majeure* clauses. The applicable law provision makes reference to international law which body of law recognizes the principle of *clausula rebus sic stantibus*.[31]Under this principle, international law acknowledges the basis for eventual revision or adjustment of concessional terms owing to an event that causes a party to fail to perform its contractual obligations.

This study seeks to investigate how the cancelled development agreements may be renegotiated despite a clause expressly providing for renegotiation.

1.3 Research Question

This study argues that the tax mining regimes introduced by the Zambian government during the 2008 fiscal year, though amended during the 2009 fiscal year and the 2015 fiscal year, in fact breached the tax stability clauses contained in the cancelled development agreements. The said tax regimes resulted in a "material adverse effect" on the distributable profits of mining companies or the dividends received by the shareholders of the Company. This is evidently demonstrated by the fact that the majority of the mining companies stumbled financially in consequence of the introduction of the new tax measures and so they gave rise

[30] Salacuse (n 22 above) 276.

[31] HT Mato 'The Role of Stability and Renegotiation in Transnational Petroleum Agreements' (2012) 5 *Journal of Politics and Law* 30 -32.

to retrenchment measures and the shutting down of mining operations. Accordingly, should the aggrieved mining companies decide to take the Government before international arbitration tribunals, compensation will be awarded. The study, thus, argues that it is good practice to renegotiate and adapt the terms of long-term contracts in cases of events that fundamentally affect the economic equilibrium of concessions. This is aimed at providing contractual flexibility to circumvent the changes in circumstances that inevitably occur owing to the very nature of long-term concession.

To support the arguments above, the research shall employ the following questions: (i) What is the nature and legal efficacy of tax stabilization clauses in the long-term concessions? (ii) What is the nature and legal status of renegotiation and adaptation clauses in long-term concessions? (iii) What was the Zambian tax mining regime after privatisation of the Zambian Consolidated Copper Mines? (iv) What are the key features of the 2008 mining fiscal regime of Zambia, as amended in 2009, and how are they different from the core features of the fiscal regime stabilised in favour of mining companies that were cancelled?

1.4 Thesis statement

This study argues that the continued introduction of new tax mining regimes by the Zambian government over the years in total disregard of the tax stability clauses in the development agreements signed in the late 1990s and early 2000s is, in fact, a breach of the said agreements. It further argues that the renegotiation of development agreements between the Zambian government and the mining investors is an amicable way of dealing with unforeseen changes that may affect the financial and economic benefits of the contract. Renegotiation clauses foster flexibility and an amendable approach to long-term agreements.

1.5 Significance of the study

Many researchers and scholars across the globe have made contributions relating to the concept of renegotiation clauses in long term concessions. Even so, no particular research has ever focused on development agreements in Zambia in the manner that this research does. This study, therefore, contributes to the sphere of academics by offering the unique concept of renegotiating and adapting cancelled development agreements in the absence of renegotiation clauses. It shows that renegotiating development agreements, even in the face of the cancellation of the said agreements in 2008, fosters better flexibility and so maintaining the relationship between Government and the Mining investors.

The study also offers advice to both the government of the Republic of Zambia and the investors on the importance of inserting renegotiation and adaptation clauses in long-term mining agreements to cater for events unforeseen at the time of the concluding of such agreements. Additionally, the dissertation shows that the continued changes of tax regimes by government, contrary to the tax stability clauses in the development agreements, creates a bad investment climate profile for the country.

1.6 Literature review

Various scholars in the world have written about the nature, purpose, categories and importance of stability and renegotiation clauses in long-term concessions.[32] The study starts by examining and reviewing the literature regarding stabilisation clauses in long-term concessions. It looks not only at long-term agreements that include renegotiation clauses but also those that do not have such clauses. The study further examines the adaptation process and provides solutions relative to how the parties may deal with a failed renegotiation and adaptation process.

Coale argues that mining concessions need "a large initial outlay of capital, long-term investment in projects including exploration, appraisal and development that must be recouped from earnings."[33] As such, these investments expose foreign investors in natural resource projects to substantial risk for an extended period.[34] According to Curtis, stabilisation clauses speak merely to one kind of risk, namely political risk.[35] He contends that, in an effort to manage the political risk associated with these mining concessions, foreign investors have always devised a mechanism for inserting stabilisation clauses in such concessions.[36] Faruque adds to the subject and contends that the involvement of the state as a contracting party in these long-term concessions casts serious fears among investors of the

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[32] TH Walde 'Revision of Transnational Investment Agreements: Contractual Flexibility in Natural Resources Development '(1978) 9 *University of Miami Inter-American Law Review 265.*

[33] MTB Coale 'Stabilization clauses in International Petroleum Transactions' (2001 -2002) 30 *Denver Journal of International Law and Policy* 219. See also AFM Maniruzzaman 'The pursuit of stability in international energy investment contracts: A critical appraisal of the emerging trends'(2008) 1 *Journal of World Energy Law & Business* 121 – 157.

[34] Maniruzzaman (n 33 above) 121-157.

[35] CT Curtis 'The Legal Security of Economic Development Agreements' (1988) 29 *Harvard International Law Journal* 317- 318.

[36] Coale (n 33 above) 219.

likelihood of a unilateral modification of the negotiated terms or a premature termination of the concession.[37]

Stability clauses "are meant to restrain a government from subsequently abrogating or otherwise intervening by exercise of state powers in investment agreements concluded with foreign companies."[38] They are clauses that 'specifically seek to secure the agreement against future government action or changes in law'.[39] The foregoing is realised by immunizing the mining concessions from domestic law by delocalizing them.[40] By so doing, they provide safeguards against risks of regulatory changes for foreign investors.[41] Stabilisation clauses in mining concessions protect the foreign investors' interests from unilateral and arbitrary changes or modifications of the terms of such contracts without the mutual consent of the other party.[42] They are a form of a guarantee given by the state in a concession that the terms of the contract negotiated will not be unilaterally abrogated by legislative or administrative actions.[43] The spirit is to prevent the host state from interfering with the negotiated terms of the contract through the promulgation of legislation and through regulation.[44] In this same vein, Maniruzzaman argues that stabilisation clauses fundamentally 'tie the hands of the host state during the subsistence of the long-term concession so that the host state cannot interfere with the interests of an investor.'[45] He, thus, further contends that stabilisation clauses insulate the concession from unilateral changes of the terms of the contract by the host state

[37] Faruque (n 21 above) 317-318.

[38] TW Walde and G Ndi 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1996) 31 *Texas International Law Journal* 216.

[39] Curtis (n 35 above) 346.

[40] AFM Maniruzzaman 'Some Reflections on Stabilisation Techniques in International Petroleum, Gas and Mineral Agreements' (2005) *International Energy Law and Taxation Review* 97. See also AA Fatouros 'International Law and the Internationalized Contract' (1980) 74 *American Journal of International Law* 134.

[41]K Gehne and R Brillo 'Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment' http://nccr.stage.bnzk.ch/fileadmin/user_upload/nccr-trade.ch/wp2/Stab_clauses_final_final.pdf (accessed 5 September 2017).

[42] Maniruzzaman (n 40 above) 96.

[43] Faruque (n 21 above) 318.

[44]Faruque (n 21 above) 318.

[45] Maniruzzaman (n 33 above) 138.

by way of legislative or administrative measures.[46] They are an assurance to foreign investors that the sanctity of the concession will be preserved and respected.[47]

Scholars seem to agree about the payment of compensation for the breach of a stabilisation clause. Ng'ambi argues that the foregoing is premised on the fact that, since a stabilisation clause does not restrain the state's inherent right to expropriate, it follows that a breach of it will warrant compensation.[48] Maniruzzaman argues that, by inserting a stabilisation clause in a mining concession, the host country "thus creates for the benefit of the other contracting party a legitimate expectation that has to be reflected in the propriety of indemnification when such expectation gets frustrated."[49] On the same subject, Maniruzzaman submits that it is the practice of international arbitration that compensation awarded for breach of a stabilisation clause is usually in monetary form.[50] According to Ng'ambi, the payment of compensation may include the payment of actual damages sustained (*damnum emergens*) and the payment of loss of future profits (*lucrum cessans*).[51]

Authors have argued that stabilisation clauses, though they provide efficiency to the concession by creating a stable and a predicable contractual regime, are very rigid and lack flexibility to encompass unforeseen changes that affect the viability of the contract at the signature of the concession. Consequently, Mato argues that the insertion of stabilisation clauses in a concession does not detract the host government from enacting laws that are inconsistent with its commitments in the said concession.[52] Accordingly, the usefulness of a stabilisation clause can be said to be merely a psychological boost to attract foreign investors.[53] As such there is a new shift towards seeking a more flexible and amendable

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[46] Maniruzzaman (n 33 above) 138.

[47] M Sornarajah 'The Settlement of Foreign Investment Disputes' (2000) 49.

[48] E Oshionebo 'Stabilisation Clauses in Natural Resources Extraction Contracts: Legal, Econonic and Social Implications for Developing Countries' (2010) 10 *Asper Review of International Business and Trade Law 33*. See also Faruque (n 21 above) 330; AFM Maniruzzaman 'Damages for breach of stabilisation clauses in international investment law: where do we stand today?' *International Energy Law & Taxation Review* (2007) 246 – 247.

[49] AFM Maniruzzaman (n 48 above) 246 – 247.

[50] AFM Maniruzzaman (n 48 above) 247.

[51] Ng'ambi (n 2 above) 125.

[52] Mato (n 31 above) 34.

[53] C Madumere 'Balancing Stabilisation Clauses with Human Rights Obligations under International Law' https://www.pressreader.com/nigeria/thisday/20160105/281857232518006 (accessed 18 September 2017).

contractual approach to long-term concession. It is argued that this can be achieved through the insertion of renegotiation and adaptation clauses in long-term concessions.

Many distinguished scholars all over the globe have expressed their views on the nature, purpose, categories and importance of renegotiation clauses in long-term concessions. Smith and Wells have this to say on the subject:

> As soon as a commercially valuable mineral is developed, the psychology of the government is altered. The company may begin to enjoy a high return on its investment. The government … may begin to feel that the resource is virtually being given away. The stage is set for renegotiation, as the original risks are forgotten. Usually the old terms are modified and the parties adopt new terms that are more favourable to the government than those agreed to under considerations of relative uncertainty.[54]

The above undoubtedly explains the importance of renegotiation and adaptation clauses in long-term concessions. Further to the foregoing, Berger observes that:

> "Renegotiation clauses are provisions in contracts that, upon the happening of a certain event or events, require all parties to return to the bargaining table and renegotiate the terms of their agreement."[55]

The learned author goes on to argue that owing to the inherent nature of long-term concessions, the investment contract tends to be affected by the economic, political and social climate which inevitably calls upon contracting parties to renegotiate the provisions of the concession.[56] The goal, according to Al Faruque, is for parties to attain the equilibrium that existed at the entry of such investment contract.[57] According to the learned author, "renegotiation clauses protect not only the host state's sovereign right to change laws that may affect the contract but also protect the investors."[58] Consequently, a renegotiation and adaptation clause "leaves a state's sovereignty intact and protects investors against changes in the law governing the agreement."[59]

Gotanda underscores the importance of renegotiation clauses in long-term concessions.[60] He, however, contends that "renegotiation clauses should not be included

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[54] DN Smith and LT Wells *'Negotiating third-world mineral agreements: Promises as Prologue'* (1975) 19.

[55] KP Berger 'Renegotiation and Adaptation of international investment contracts: the role of contract drafters and arbitrators' (2003) 36 *Vanderbilt Journal of Transnational Law* 1347

[56] Berger (n 24 above) 1348.

[57] A AL Faruque 'Renegotiation and Adaptation of Petroleum Contracts: The Quest for Equilibrium and Stability' (2008) 9 *Journal of world Investment and Trade* 120. See also Berger (n 24 above) 1348.

[58] Berger (n 24 above) 1348.

[59] Berger (n 24 above) 1364.

[60] JY Gotanda 'Renegotiation and Adaptation clauses in investment contracts, revisited' (2003) 36 *Vanderbilt Journal of Transnational law* 1461.

when one of the parties controls the event that triggers renegotiation and adaptation."[61] The learned author suggests that renegotiation and adaption clauses, if inserted in an investment contract, should provide a clear guide to be applied by the tribunal in the process of adaption of the agreement.[62]

Sornarajah supports the arguments of Berger discussed above. He underpins the significance of renegotiation clauses and argues that there is an obligation to insert such clauses in long-term concessions.[63] He premises his argument on the fact that renegotiation clauses re-create an evenness that existed at the time the concession was entered.[64] Accordingly, renegotiation clauses tend to permit parties to renegotiate terms that may have been affected owing to a change of circumstance.[65]

In addition, Sornarajah argues that renegotiation clauses augment stabilization clauses. He argues that stabilisation clauses "freeze the law as it was at the time of entry of the investment and ensure that later changes to the law did not apply to the concession."[66] He adds that:

> a stabilization clause is intended to immunise the foreign investment contract from a range of matters, such as taxation, environmental controls and other regulations, as well as to protect the destruction of the contract itself before the contract expires.[67]

The learned author contends further that the insertion of stabilization clauses neutralizes the sovereign power of the host state from enacting laws that, in fact, may affect the contract.[68] Be it as it may, the learned author argues that the state's sovereign power to pass laws cannot be fettered by contractual obligations.[69] Accordingly, a host state still may pass laws that may

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[61] Gotanda (n 60 above) 1461.

[62] Gotanda (n 60 above) 1462.

[63] M Sornarajah *The International Law on foreign investment* 3rd ed. (2010) 244.

[64] Kolo and Walde (n 25 above) 5. See also Mato (n 31 above) 35.

[65] ZA Al Qurashi 'Renegotiation of International Petroleum Agreements Renegotiation of International Petroleum Agreements' (2005) 22 *Journal of International Arbitration* 262. See also Sornarajah (n 63 above) 244.

[66] Sornarajah (n 63 above) 281.

[67] Sornarajah (n 63 above) 282.

[68] Ng'ambi (n 2 above) 123 - 147.

[69] Mato (n 31 above) 34.

affect or change the terms of the long-term concession notwithstanding the existence of stability clauses.[70]

Salacuse argues that there is a need to balance contractual stability and flexibility in order to attain contractual efficiency.[71] He further states that, as parties negotiate long-term contracts, they pursue contractual stability. The foregoing notwithstanding, the parties know at the same time that, during the substance of the long-term contract, events might occur that may drastically affect their envisioned benefits from the project[72].

Renegotiation clauses obligate contracting parties to negotiation when there is change of circumstances that destroy the economic equilibrium in the contract.[73] The obligation to renegotiation envisages that the parties will do the same in good faith[74], fairly and with utmost seriousness because the obligation itself stems from the concession.[75]

The above notwithstanding, it must be noted that the obligation to renegotiate contractual terms "does not imply an obligation to reach an agreement."[76] For, as Al Faruque correctly observes:

> It is a well-established principle that an obligation to renegotiate a contract obligates the parties only to negotiate (*obligation de moyens*), but it does not imply an obligation to reach an agreement (*obligation de resultat*).[77]

Most of the long-term concessions contain express provisions for renegotiation and adaption clauses as safeguards to enable parties to deal with an onerous event should the same happen in the future. There are, however, instances where a concession does not have an express provision for renegotiation and adaptation clauses. Renegotiation and adaptation in the absence of a specific provision for renegotiation and adaptation clauses create a great deal of

[70] Sornarajah (n 63 above) 283. See also Mato (n 31 above) 34.

[71] Salacuse (n 22 above) 281.

[72] Salacuse (n 22 above) 281.

[73] JW Salacuse 'Renegotiating International Project Agreements'(2001) 24 *Fordham International Law Journal* 1334.Ng'ambi (n 2 above) 149.

[74]Berger (n 24 above) 1360 to 1367.

[75] Ng'ambi (n 2 above) 149.

[76] AL Faruque (n 57 above) 129. See also Ng'ambi (n 2 above) 149; Salacuse (n 73 above) 1334.

[77] AL Faruque (n 57 above) 129.

trouble.[78] In the absence of an express provision for renegotiation, contracting parties may resort to looking at other provisions of the contract that may facilitate a renegotiation as an appropriate starting point.[79] In such cases, the parties can look to applicable law, *force majeure* and hardship clauses to trigger renegotiation.

1.7 Research methodology

This study is fundamentally a library and desk literature-based study. It is heavily reliant on the pertinent primary and secondary sources of information regarding the topic. Additionally, it takes broad recourses in the historical and comparative approaches in analysing the facts surrounding the renegotiation process and its rationale. Primary sources of information include, but are not limited to: (a) the Constitution of the Republic of Zambia; (b) Zambian Mines and Minerals Development Act, 1995; (c) Zambian Mines and Minerals Development Act, 2008; (d) relevant Zambian fiscal laws; (e) Interpretation; (f) various mining development agreements signed between the government of the Republic of Zambia and mining companies; and (g) published arbitral awards.

Secondary sources of information include, but are not limited to: (a) books and Journal Articles; (b) study reports on renegotiation and adaptation clauses; (c) papers written by academics and researchers on issues pertinent to the study; and (d) NGO's reports, speeches and daily newspapers containing information relating to the issues under research.

1.8 Scope and Limitation of the Study

The study focuses on the renegotiation and adaptation of development agreements in Zambia that were cancelled in 2008. Although the said agreements were cancelled, the mining companies has continued to operate on either oral agreements or on the same agreements thereby making difficult to ascertain the nature of the relationship between the parties. There was some limitation with respect to accessing documents that may evidence the basis of the continued relationship between the parties despite the 2008 cancellation.

[78] M Sornarajah 'Supremacy of the Renegotiation Clause in International Contracts' (1988) 5 *Journal of International Arbitration* 97-114.

[79] N Horn 'Changes in Circumstances and the Revision of Contracts in Some European Laws and International Law (1985) 18-19; Berger (no.245 above) 1350; W Peter 'Arbitration and Renegotiation of International Investment Agreements' (1995) 18- 19.

1.9 Outline of chapters

This study comprises five chapters.

Chapter one introduces the study.

Chapter two focuses on the nature and legal efficacy of stabilisation clauses.

Chapter three discusses the nature, scope and efficacy of renegotiation and adaptation clauses.

Chapter four focuses on the Zambia's tax mining regime after the privatisation of ZCCM.

Chapter five makes some concluding remarks for the study and offers some recommendations

CHAPTER TWO

THE NATURE AND LEGAL EFFICACY OF STABILISATION CLAUSES

2.1 Introduction

Long-term concessions such as those for petroleum, gas and mining require a huge injection of capital and cover very long periods, ranging from 15 to 60 years.[1] The realisation of profits for these concessions takes time. Accordingly, investors for such projects rely on financial institutions, such as "banks, export financing institutions, long-term purchasers of production, international and national development finance institutions, and portfolio investors, such as pension funds"[2] for capitalization during the implementation period. The chief concern of the financial institutions is the ability of the project to repay its debt from the proceeds of the project itself.[3] Sophisticated and elaborate financing covenants are, thus, prepared with the participation of lenders.[4] The aim "is to ensure that the project's revenues, after paying for operating expenditure essential to maintain the operations, are used with the priority of servicing the debt"[5].

As a consequence of the huge demands for capitalization for development and the high-risk associated with these long-term concessions, most host states, particularly developing states, lack the capacity to undertake such projects.[6] Instead they encourage foreign investors to take up the high-risk of the exploration and exploitation of their natural resources.[7] This unavoidably leads to the negotiation of long-term concessions for the exploration and exploitation of natural resources between the host states and foreign Investors. The involvement of the state as a contracting party to these long-term concessions creates serious fears among investors of the likelihood of a unilateral modification of the

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[1] AFM Maniruzzaman 'The pursuit of stability in international energy investment contracts: A critical appraisal of the emerging trends'(2008) 1 *Journal of World Energy Law & Business* 121 – 157.

[2] TW Walde and G Ndi 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1996) 31 *Texas International Law Journal* 228.

[3] Walde and Ndi (n 2 above) 228.

[4] Walde and Ndi (n 2 above) 228.

[5] Walde and Ndi (n 2 above) 228.

[6] MTB Coale 'Stabilization clauses in International Petroleum Transactions' (2001 -2002) 30 *Denver Journal of International Law and Policy* 219.

[7] Walde and Ndi (n 2 above) 223.

negotiated terms or the premature termination of the concession.[8] The fears are predicated on the state's inherent sovereign legislative powers. Against this background, foreign investors in long-term concessions have always wanted stability guarantees as a protection mechanism from the unilateral exercise of the host government's sovereign power to change, modify or prematurely terminate the concession.[9] Stabilisation clauses are a mechanism that has been employed to manage the political risk of the host state's power to modify the terms of the long-term concession unilaterally through its legislative and administrative actions.[10] Foreign investors in long-term concessions have, thus, always insisted on the insertion of a stabilisation clause as a protection mechanism from the unilateral actions of the state stemming from its sovereignty.

This chapter discusses the nature and legal efficacy of stabilization clauses, identifies their scope and different types. Furthermore, it explores their purpose and examines their legal effect, value and validity in the light of international arbitration jurisprudence. It outlines the rigidity of these clauses and shows how arbitral tribunals have dealt with the issue of compensation in cases of breach of contract.

2.2 Definition of stabilisation clauses

Mining concessions demand "a large initial outlay of capital, long-term investment in projects, including exploration, appraisal and development that must be recouped from earnings."[11] As such, these investments expose foreign investors in natural resource projects to substantial risk for an extended period. The risks involved include, but are not limited to, "commercial (price volatility), financial (interest rate volatility), geological (no deposit found), technical (failure of the installations to perform as planned), managerial (labour problems) and natural disasters."[12] Suffice it to note that the foregoing risks are difficult to manage or control through mining concessions, and they are never addressed by stabilisation clauses. Stabilisation clauses merely speak to one kind of risk, namely political risk.[13] In an

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[8] A Faruque 'Validity and Efficacy of Stabilisation Clauses: Legal Protection vs Functional Value '(2006) 23 *Journal of International Arbitration* 317 – 318.

[9] Maniruzzaman (n 1 above) 121 -157.

[10] Coale (n 6 above) 219.

[11] Coale (no 6 above) 219.

[12] Coale (no 6 above) 219.

[13] CT Curtis 'The Legal Security of Economic Development Agreements' (1988) 29 *Harvard International Law Journal* 317- 318.

effort to manage the political risk associated with these mining concessions, foreign investors have always devised a mechanism of inserting stabilisation clauses in such concessions.[14]

A study under the sponsorship of the Special Representative of the Secretary-General for business and human rights (SRSG) and the International Finance Corporation (IFC) was conducted in 2008 (herein after called the 2008 study).[15] The 2008 study was engaged to "explore the role of stabilization clauses in practice, in particular regarding their potential to negatively influence host states' and companies' human rights compliance record."[16] It defined stability clauses as "contractual clauses in private contracts between investors and host states that address the issue of changes in law in the host state during the life of the project."[17]

These clauses are "meant to restrain a government from subsequently abrogating or otherwise intervening by exercise of state powers in investment agreements concluded with foreign companies."[18] They are clauses that "specifically seek to secure the agreement against future government action or changes in law".[19] The foregoing is realised by immunizing the mining concessions from domestic law by delocalizing them.[20] By doing this, they provide safeguards against risks of regulatory changes for foreign investors.[21] Stabilisation clauses in mining concessions protect the foreign investors' interests from unilateral and arbitrary changes or modifications of the terms of such contracts without the mutual consent of the other party.[22] They are a form of a guarantee given by the state in a concession that the terms of the contract negotiated will not be unilaterally abrogated by legislative or administrative

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[14] Coale (n 6 above) 219.

[15] K Gehne and R Brillo 'Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment' http://nccr.stage.bnzk.ch/fileadmin/user_upload/nccr-trade.ch/wp2/Stab_clauses_final_final.pdf (accessed 5 September 2017).

[16] Gehne and Brillo (n 15 above).

[17] A Shemberg 'Stabilization Clauses and Human Rights, IFC/SRSG Research Paper. 11 March' (2008) http://www.ifc.org/ifcext/sustainability.nsf/Content/Publications_LOE_Stabilization , p. 4 (accessed 6 September 2017).

[18] Walde and Ndi (n 2 above) 216.

[19] Curtis (n 13 above) 346.

[20] AFM Maniruzzaman 'Some Reflections on Stabilisation Techniques in International Petroleum, Gas and Mineral Agreements' (2005) *International Energy Law and Taxation Review* 97. See also AA Fatouros 'International Law and the Internationalized Contract' (1980) 74 *American Journal of International Law* 134.

[21] Gehne and Brillo (n 15 above).

[22] Maniruzzaman (n 20 above) 96.

actions.[23] The spirit is to prevent the host state from interfering with the negotiated terms of the contract through the promulgation of legislation and regulation.[24] Accordingly, they fundamentally tie the hands of the host state during the subsistence of the long-term concession so that the host state cannot interfere with the interests of an investor. [25]Stabilisation clauses, thus, insulate the concession from unilateral changes of the terms of the contract by the host state by way of legislative or administrative measures.[26] They are an assurance to foreign investors that the sanctity of the concession will be preserved and respected.[27]Lastly, as aptly summarised by Mato, stabilisation clauses are mainly directed against:

> (1) the raising of taxes beyond the rates operating at the time of the agreement or otherwise stipulated in the agreement. (2) The imposition of any fiscal changes in the general industrial or commercial sectors in excess of the fiscal charges provided in the agreement. (3) The amendment of the laws, such as corporate and tax laws, which were in force on the date of the agreement. (4) Expropriation, nationalization and any other form of intervention in the enterprise.[28]

2.3 Scope of stabilisation clauses

Foreign investors insist on some pledge that the sanctity of a contract will be respected by the host government and that the terms therein will not be unilaterally changed or modified by the host state through legislation or regulation.[29] In this regard, the scope of stabilisation clauses in mining concessions depends on what guarantees the foreign investors would want to achieve through such contracts.[30] The scope of stabilisation clauses can be either comprehensive or limited.[31]

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[23] Faruque (n 8 above) 318.

[24]Faruque (n 8 above) 318.

[25] Maniruzzaman (n 1 above) 138.

[26] Maniruzzaman (n 1 above) 138.

[27] M Sornarajah *The Settlement of Foreign Investment Disputes* (2000) 49.

[28] HT Mato 'The Role of Stability and Renegotiation in Transnational Petroleum Agreements' (2012) 5 *'Journal of Politics and Law'* 34.

[29] Curtis (n 13 above) 317 -318.

[30] Sornarajah (n 24 above) 49.

[31] Faruque (n 8 above) 318.

2.3.1 Stabilisation clauses that are comprehensive in scope

Stabilisation clauses that are comprehensive in scope are those that restrict the whole range of legislative competence by the host government.[32] These clauses purport to immunize the concession from all changes in the laws of the host country, both future and present. In short, the sovereign power of the host state to change its legislation or regulation in respect of the concession is frozen for the duration of the contract.[33] These clauses that are comprehensive in scope are less common nowadays because they offend the sovereignty of the host state with regard to legislation.

2.3.2 Stabilisation clauses that are limited in scope

Stabilisation clauses that are limited in scope aim at insulating the State's contractual undertakings from a specific law only.[34] Here, the sovereign power of the host state to legislate is locked into specific legislation or regulations pertaining to the concession. They apply only to specific legislation or regulations such as Tax, Labour, the Environment, and so on.[35]

2.4 Classifications of stabilisation clauses

The 2008 study identified three main kinds of stabilisation clauses: (i) freezing clauses; (ii) equilibrium clauses; and (iii) hybrid clauses.[36] According to the 2008 study, 'freezing clauses' are those that excuse an investment from the application of new laws promulgated after the entry of the contract.[37] These clauses 'freeze' the host state's power to make new legislation or regulations that may impact on the contract. Suffice to note that the 'freezing clauses' release an investment from the application of new laws either comprehensively or limited to specific laws such as tax, labour or environmental.[38] The 2008 study, described 'equilibrium clauses' as those "that cover the financial loss that relates to changes in law".[39] According to the 2008 study, 'hybrid clauses' are those that have a mixture of both the

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[32] Faruque (n 8 above) 318.

[33] P Bernardini 'Stabilization and adaptation in oil and gas investments' (2008) 1 *Journal of World Energy Law & Business* 98.

[34] Faruque (n 8 above) 318.

[35] Faruque (n 8 above) 318.

[36] Shemberg (n 17 above) 80.

[37] Shemberg (n 17 above) 80.

[38] Faruque (n 8 above) 318.

[39] Gehne and Brillo (n 15 above).

freezing and equilibrium clauses.[40] Hybrid clauses allow the parties to ascertain whether economic evenness is to be realised through exclusion from regulatory change or other forms of "alleviation of the unfavourable impact of changes."[41]

In this chapter, stabilisation clauses will be classified into three main categories, namely stabilisation clauses *stricto sensu*,[42] intangible clauses and economic stabilisation clauses.[43]

2.4.1 Stabilisation clauses *stricto sensu*

These are clauses that ensure that the *status quo* pertaining to the law that was applicable at the consummation of the mining concession remains unchanged for the duration of the contract.[44] In this sense, the applicable law to the concession will be that which existed at the time of the execution of the said concession. Stabilisation clauses *stricto sensu* take the form of freezing and supremacy stabilisation clauses.[45]

A freezing stabilisation clause is one that locks the domestic law of the host country on the day the concession is consummated for the lifetime of such a concession.[46] The idea under this categorization is to paralyse the legislative or administrative powers of the host state as they pertain to the contract for the period of the contract. In this way, it insulates the concession from the host state's unilateral changes of the negotiated terms of such a concession through legislation or regulation.[47]

The other form of a stabilisation clause *stricto sensu* is the supremacy clause. Under this categorization, the concession itself is made supreme.[48] In this sense, any subsequently promulgated laws enacted after the execution of the contract are applicable only to the extent of their consistency with the provisions of the concession. Accordingly, in the case of any conflict between the provisions of the concession and the subsequent laws, the former

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[40] Shemberg (n 17 above) 80.

[41] Gehne and Brillo (n 15 above)15.

[42] Walde and Ndi (n 2 above) 223 -226.

[43] Maniruzzaman (n 1 above) 122- 124. See also SP Ng'ambi *Resource Nationalisation in International Investment Law* (2016) 53 – 54.

[44] Faruque (n 8 above) 319.

[45] Maniruzzaman (n 20 above) 97.

[46] Faruque (n 8 above) 319.

[47] Maniruzzaman (n 1 above) 122.

[48] Maniruzzaman (n 1 above) 122.

prevails.[49] The provisions of the concessions will rank supreme over new legislation or regulations for the period of the concession. The provisions of the contract, thus, become "a special law i.e. to accord supremacy to the contract as *lex specialis* over current or subsequent legislative enactments."[50] A good example is the Azeri Agreement of 1999 which reads as follows:

> 'Upon approval by the Parliament of the Azerbaijan Republic of this Agreement, this Agreement shall constitute a law of the Azerbaijan Republic and shall take precedence over any other current or future law, decree or administrative order (or part thereof) of the Azerbaijan Republic which is inconsistent with or conflicts with this Agreement except as specifically otherwise provided in this Agreement.'[51]

Some commenters have classified the approach taken by the stabilisation clauses *stricto sensu* as the classic approach because of its rigidity. It is imperative to note that stabilisation clauses *stricto sensu* are less common and are inconsistent with the principle of non-retroactivity of law.[52]

2.4.2 Intangible clauses

This kind of stabilisation clause designates that the terms of the investment concession once negotiated and agreed upon cannot be unilaterally changed or modified without the consent of the contracting parties therein.[53] Consequently, "these clauses do not contain an explicit waiver of the legislative sovereignty but rather seek to prevent unilateral modification of contract by the host state."[54]

There is, therefore, a huge discrepancy between stabilisation clauses *stricto sensu* and intangible clause.[55] The key difference between the two is that, while stabilisation clauses *stricto sensu* protect foreign investors from the host state's interference of the contract through changing the applicable law through legislation or administrative action, the intangible clauses shield foreign investors from the government's unilateral change of the

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[49] Faruque (n 8 above) 319.

[50] Maniruzzaman (no.1 above) 122.

[51] Art 24.1, Agreement on the Exploration Development and Production sharing for the Block including the Padar Area and the Adjacent Prospective Structures in the Azerbaijan Republic between the State Oil Co of Azerbaijan and Kura Valley Development Co Ltd and Socar Oil Affiliate (dated 19 April 1999).

[52] Faruque (n 8 above) 319.

[53] Maniruzzaman (n 20 above) 97.

[54] Faruque (n 8 above) 319.

[55] Faruque (n 8 above) 320.

terms of the contract without consent.[56] In this view, the stabilisation *stricto sensu* limits the host state's legislative powers whereas the intangible clauses guard against the host state's power to change the contract terms without the consent of the investors.[57]

It is imperative to note that, with respect to an intangible clause, mutual consent of the parties may be implied especially where the investment concession is silent on the matter. [58]

2.4.3 Economic stabilisation clauses

These clauses ensure that the host country will not take legislative or administrative measures that will have any material adverse effect on the mining concession.[59] Accordingly, if the host changes the law that affects the contract, compensation follows to redress the effect. In the premises, the foreign investor who has suffered any material adverse effect will be restored to the same economic equilibrium that existed before the changes were made by the host state.[60]

This type of stability clause is more common because it does not restrict the host state's sovereign right to change its laws or fiscal policies.[61] Equilibrium clauses provide a form of mitigatory mechanism to protect the investor from the losses the project suffers.[62] Some commentators observe that this type of stabilisation clause is popular because "it is more compatible with the notion of the legislative freedom of the state."[63]

2.4.4 Disguised or indirect stabilisation clauses

Supporters of this type of stabilisation clause argue that the stability of the contractual relationship is realised by subjecting the mining concession to the provisions of international law or general provisions of law.[64] This argument is anchored on the fact that the provisions of international law or general principles of law are stable and do not usually change.[65]

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[56] Faruque (n 8 above) 320.

[57]Shemberg (n 17 above).

[58] Faruque (n 8 above) 320.

[59] Shemberg (n 17 above).

[60] Faruque (n 8 above) 320.

[61] Shemberg (n 17 above).

[62] Faruque (n 8 above) 321.

[63] Faruque (no.8 above) 321.

[64] Maniruzzaman (n 1 above) 125.

[65] Maniruzzaman (n 1 above) 125.

Subjecting a mining concession to this stable body of law, therefore, brings about stability to the contractual association between the host government and the foreign investor.[66] This is unlike municipal laws which are unstable owing to governmental interference via legislative or administrative measures.[67] In view of the above, commentators argue that international law ensures greater security for mining concessions than domestic law that is vulnerable to alteration at the whim of the host government does.[68]

International arbitration tribunals have had occasion to pronounce themselves on the issue of the internationalization of mining concessions.[69] They have argued that it is not only international law that decolonizes or delocalizes mining concessions but also any other 'national applicable law provision.'[70] These include general principles of law and *lex mercatoria*.[71] This helps to insulate the contract from the impact of national legislation changes.[72]

It has to be emphasized that the application of international law or a-national principles alone will not bring about the stability of contract.[73] There is, therefore, a "need to provide for international arbitration and [an] international or a-national procedural law that governs such arbitration to give effect to such expectation."[74] As Montembault correctly notes:

> (t)he submission to arbitration in [an] oil contract therefore constitutes an essential tool in the stabilization of the legal framework surrounding oil operations, not only because it neutralizes the jurisdictional power of the host State but also because such a clause affects and determines the law applicable to the contract.[75]

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[66] Maniruzzaman (n 1 above) 125.

[67] Maniruzzaman (n 1 above) 125.

[68] AFM Maniruzzaman 'State contracts in Contemporary International Law: Monist versus Dualist controversies' (2001) 12 *European Journal of International Law* 309.

[69] Maniruzzaman (n 68 above) 309.

[70] AFM Maniruzzaman 'The Lex Mercatoria and International Contracts: A challenge for International Commercial Arbitration?' (1999) 14 *American University International Law Review* 734.

[71]Maniruzzaman (n 70 above) 734.

[72] Maniruzzaman (n 70 above) 734.

[73] Maniruzzaman (n 70 above) 126.

[74] Maniruzzaman (n 70 above) 126.

[75] B Montembault 'The Stabilisation of state contracts using the example of oil contracts: A return of the Gods of Olympia?' (2003) 6 *International Business Journal* 603.

2.5 Purpose of stabilisation clauses

The philosophy behind the insertion of stabilisation clauses into mining concessions is to immunize such concessions from governmental intervention through legislation or regulation. They seek to maintain the existing state of affairs by locking the host state's legislative power on the day the concession is executed. In this way, the applicable law to the concession is that which obtained at the material date of entry into contract. Consequently, all subsequent legislation or regulations have no applicability to the concession. The primary purpose of stability provisions is "to tie the hands of the state party during the life of a project under an international energy and natural resource development contract so that the state party cannot interfere with the interests of the investor."[76] In their premises, stabilisation clauses seek the following purposes: (i) guarantee legal certainty; (ii) inspire foreign investments; and (iii) immunization from political risk.[77]

2.5.1 Guarantees legal certainty and predictability

One of the tenets of a good legal system is the certainty and predictability of the law and judicial decisions.[78] It is on the basis of this legal principle that investors insist on inserting stabilisation clauses in mining concessions. Stabilisation clauses tend to seek the predictability and certainty of the law by freezing the law of the host state on the day the contract is consummated and so making subsequent laws or regulations inapplicable.[79]

The rationale behind such insistence is that the host state's behaviour tends to be uncertain and unpredictable, particularly when the project becomes viable.[80] Stabilisation clauses are, thus, included in mining concessions as a way of policing state behaviour.[81]

Furthermore, stabilisation clauses help foreign investors to plan and project the viability of the project.[82] It is important to note that investors in these concession rely heavily

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[76] https://www.lawteacher.net/free-law-essays/international-law/the-function-of-stabilisation-and-renegotiation-clauses-in-production-sharing-contracts-international-law-essay.php (accessed 7 September 2017)

[77] Faruque (n 8 above) 321.

[78] Faruque (n 8 above) 322.

[79] Faruque (n 8 above) 322.

[80] Faruque (n 8 above) 322.

[81] Faruque (n 8 above) 322.

[82] Walde and Ndi (n 2 above) 228.

on financial institutions, both international and national, for loans to capitalize the projects.[83] These financial institutions look to the project itself for the repayments of the loans.[84] As such, the financial institutions insist on the insertion of stabilisation clauses in the concessions as a guarantee for the repayment of the loans. In this way, stabilisation clauses create predictability and certainty in trade and commerce.[85]

2.5.2 Inspire foreign investments

The insertion of stabilisation clauses in mining concessions is an indication, on the part of the host state, to guarantee that it will be bound by the provisions of the negotiated terms. By doing this, the host state boosts investor confidence in the state.[86]

2.5.3 Immunization from political risk

The key intention of stability clauses is to encourage the sanctity of contract. Since the International Law principle of *pacta sunt servanda* does not apply to mining concessions, investors insist on the inclusion of stabilisation clauses in mining concessions.[87] The incorporation of stabilisation clauses in mining concessions is meant to preserve contractual stability by restraining the host state's power to change the contract terms unilaterally to the great detriment of the foreign investor.[88] Hence, the key purpose of stability clauses is to insulate the investment against subsequent changes in the law by the host country through legislation or regulation.[89] This kind of change in the law may could result in a direct taking of the mining concession by the host country through nationalization or expropriation.[90] It could equally result in an indirect taking by the host state of the project through creeping expropriation, for instance, the introduction of royalty taxes or increases in taxes.[91]

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[83]Walde and Ndi (n 2 above) 228.

[84] Walde and Ndi (n 2 above) 228.

[85] Faruque (n 8 above) 322.

[86] Faruque (n 8 above) 323.

[87] Faruque (n 8 above) 321.

[88] Montembault (n 75 above) 599.

[89] SK Chatterjee 'The Stabilisation Clause Myth in Investment Agreement' (1988) *Journal of International Arbitration* 97- 111.

[90] Chatterjee (n 89 above) 97-111.

[91] Chatterjee (n 89 above) 97-111.

The political risks discussed above inevitably invite the attention of foreign investors to insist on the incorporation of stabilisation clauses in mining concessions.[92] It is important to note that the insertion of stabilisation clauses in mining concessions alone is infective if the contract lacks an international arbitration and choice of law clauses.[93]

2.6 Value of stabilisation clauses

Long-term concessions are concluded by the host state and a foreign investor premised on the basis of mutual consent.[94] Equally important is the fact that the contracting parties mutually agree the terms of the contract and intend them to be binding.[95] Since the terms of the mining concessions, particularly those pertaining the stability of the concession, are achieved by mutual consent, it follows that stabilisation clauses have value. As Faruque correctly observes:

> The protective value of stabilisation clauses does not lie in barring the state from exercising legislative power from immanent public interest, but in the fact that the presence of a stabilisation clause may ensure compensation for any breach, and may result in a higher amount of compensation if the action of the state in question is not founded on good faith or is discriminatory. [96]

In respect of the above, a stabilisation clause acts as a deterrent technique against arbitrary government action.

Furthermore, the other value of stabilisation clauses is that they are used to interpret the other provisions of the mining concession.[97] International Arbitral tribunals may interpret the legal efficacy of the other provisions of the "contract in light of the formulation of the stabilisation clause".[98]

The other value of stabilisation clauses is that they give credibility and a good reputation to the host nation.[99] This, in turn, encourages foreign investments in the host state because investors will view the host state as being a credible contracting partner.[100]

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[92] Walde and Ndi (n 2 above) 231.

[93] Ng'ambi (n 43 above) 54 -58.

[94] Faruque (n 8 above) 334.

[95] Faruque (n 8 above) 334.

[96] Faruque (n 8 above) 334.

[97]Faruque (n 8 above) 335.

[98] Faruque (n 8 above) 335.

[99] Walde and Ndi (n 2 above) 236 -237.

2.7 The validity of stabilisation clauses

Scholars seem to have different opinions with regard to the consequences of breaching a stabilisation clause. Scholars seem, however, to agree generally about the legal validity of a stabilisation clause in both municipal and international law.[101]

Proponents of the validity of a stabilisation clause premise their first argument on the principle of estoppel.[102] They argue that, since the state enters mining concessions willingly, it is estopped from repudiating the concession unless on public interest considerations, and it acts in good faith.[103] They contend that the state is estopped from arbitrary repudiating the mining concession because the foreign investor relies on it.[104]

The second argument for supporting the validity of stabilisation clauses is based on the fact that mining concessions are entered into by mutual consent of the parties. This mutual consent is as a result of the contracting parties' independent wills. It, therefore, follows that the contracting parties intend to be bound by the undertakings in the concession.

The third argument supporting the validity of stabilisation clauses is premised on the state's voluntariness to bind itself in contract. A government enters into mining concessions under the background of public law privilege.[105] The mere fact that the state undertakes to be bound by the terms of the concession means that "the state is acting *de jure imperii* in granting certain legislative immunity to a private contracting party."[106]

Some scholars have, however, severely criticised the validity of stabilisation clauses because they offend against the principles of permanent sovereignty over natural resources and the sovereignty of the state[107]. It is argued that the insertion of stabilisation clauses in mining concessions injures the state's permanent sovereignty over its natural resources.[108]

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[100] Walde and Ndi (n 2 above) 259 – 260.

[101] Faruque (n 8 above) 323.

[102] Faruque (n 8 above) 323.

[103] Faruque (n 8 above) 323.

[104] Faruque (n 8 above) 323.

[105] AS El-Kosheri and TF Raid 'The Law Governing a New Generation of Petroleum Agreements: Changes in the Arbitration Process' (1986) 1 *ICSID Review -Foreign Investment Law Journal* 266.

[106] Faruque (n 8 above) 323.

[107] Ng'ambi (n 43 above) 45 -52.

[108] Ng'ambi (n 43 above) 45-52.

These scholars contend that a state has an inalienable right over its natural resources and this right cannot be fettered or limited by the insertion of a stabilisation clause in a concession.[109] They argue that a stability provision is invalid because it hinders the host country's permanent sovereignty over its natural resources.[110] According to this principle, States have sovereignty over natural resources within their territorial jurisdiction and can do with their resources what they deem fit, even expropriating a concession.[111] The invalidity of stabilisation clauses based on the principle of permanent sovereignty over natural sources is championed primarily by developing countries.[112] Developing countries contend that the principle of permanent sovereignty over natural sources has attained the character of *jus cogens*.[113] *Jus cogens* are principles that form the norms of international law from which no derogation is permitted.[114] It is, however, argued that no rules of *jus cogens* should prevent a state from fulfilling its contractual obligation for the terms it set.[115] As rightly noted by Wolfgang Peter:

> A stabilised economic development agreement represents a judgment on the part of the contracting state that the cost of foregoing some degree of future regulatory flexibility is justified by the anticipated benefits of the investment. No rule of *jus cogens* should prevent states from implementing that judgment. When a state accepts obligations under a stabilised agreement, it is bound by the rules it set f or itself based on its judgment of its own best interests. [116]

From the foregoing it can be seen that states should fulfil the obligations they set in a stabilised agreement. Furthermore, the argument of the invalidity of a stabilisation clause based on the fact that states' freedom to contract is intact despite the fact that it has permanent sovereignty over its natural resources is flawed.[117] In fact, states have continued to contract with foreign investors and even consent to the insertion of stabilisation clauses in mining concessions. This simply shows that stabilisation clauses are valid.

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[109] Faruque (n 8 above) 323.

[110] M Sornarajah 'The Myth of International Contract Law' (1981) 15 *Journal of World Trade Law* 187.

[111] Sornarajah (n 110 above) 187.

[112] Faruque (n 8 above) 323.

[113] Faruque (n 8 above) 323.

[114] W Peter *Arbitration and Renegotiation of International Investment Agreem*ent 2nd ed (1995) 222.

[115] Peter (n 114 above) 222.

[116] Peter (n 114 above) 222.

[117] Faruque (n 8 above) 323.

The other contention against the validity of stability provisions is that they halt the sovereignty of the host state to legislate[118] This argument is countered by the fact that entry into concession by a country is an exercise of sovereignty.[119] Accordingly, if a state, by virtue of its sovereign right, decides to contract, it agrees to be bound by the provisions of the concession. In this regard, the insertion of stability provisions in mining concessions "should be treated as self-imposed but temporary limitation on the sovereignty of the host government."[120] This is why international arbitral tribunals have refused to invalidate a stabilisation clause merely on the basis of the host state pleading sovereignty. In the case of *AGIP v Popular Republic of Congo*[121], for instance, the arbitral tribunal rejected the sovereignty argument. Consequently, it held that the agreement between *AGIP* and Congo was binding.

2.8 The legal effect of stabilisation clauses

There is much debate among scholars as to the exact effect of stabilisation clauses.[122] One school of thought argues that stabilisation clauses offer complete protection to foreign investors.[123] The second school of thought, however, contends that stability provisions have no effect as they do not offer absolute protection to the investor.[124] This study associates itself with the former school of thought. The effect of stability provisions depends to a great degree on their categorisation.

2.8.1 The legal effect of intangible stabilisation clauses

As discussed above, intangible stabilisation clauses restrain the host country's powers to change the terms of the mining concession unilaterally through its legislative or administrative actions. Intangible stabilisation clauses, however, allow the host country to change the provisions of the concession provided the contracting parties mutually consent to the changes.[125] In this respect, if the host state introduces legislation or regulations that have

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[118] Faruque (n 8 above) 324.

[119] Ng'ambi (n 43 above) 45-52.

[120] Faruque (no.8 above) 324.

[121] (1982) 21 ILM 726.

[122] E Paasivirta 'Internationalization and Stabilization of Contracts versus State Sovereignty' (1989) 60 *British Yearbook of International Law* 316 -323.

[123] Ng'ambi (n 43 above) 55.

[124] Ng'ambi (n 43 above) 55.

[125] Maniruzzaman (n 1 above) 124.

the consequence of varying the provisions of the concession without the consent of the investor, such a state is in breach of the contract.[126] Breach of contract attracts compensation to redress the affected party.[127] The legal effect of intangible stabilisation clauses is, thus, that any changes in the terms of the mining concession without the mutual consent of the other contracting party amount to a breach of that concession.[128] The defaulting contracting party is, therefore, obligated to compensate the affected party. In order to ascertain appropriate compensation resulting from a breach of an intangible stabilisation clause, an arbitral tribunal looks at the intention of the parties and the reasons that necessitated the change of the terms. It will also consider the terms and conditions that have been unilaterally changed.[129]

2.8.2 The legal effect of economic stabilisation clauses

As established in our earlier discussions, these clauses ensure that the host state does not take legislative or administrative measures that will have any material adverse effect on the mining concession.[130] They do not necessarily restrict the host state's legislative or administrative powers but seek payment compensation for any legislation or regulation that affects the economic evenness of the concession.[131] In this view, economic stabilisation clauses are said to be remedial in nature.[132] They seek to remedy the affected contracting party from legislative or administrative actions that have any adverse material effect on the contract.[133] These clauses are more bent on striking a compromise between the host government's legislative freedom, on the one hand, and the foreign investor's legitimate expectation to make a profit from the project, on the other. In this regard, economic stabilisation clauses are said to be flexible.[134] These clauses seek to maintain the economic equilibrium in the concession. As such, any modification in the law that affects the equilibrium may be mitigated through compensation for the loss occasioned. Compensation payable in a case of a breach of these clauses entails that the defaulting party pays

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[126] Faruque (n 8 above) 331.

[127] Maniruzzaman (n 20 above) 97.

[128] Faruque (n 8 above) 331.

[129] Faruque (n 8 above) 331.

[130] Shemberg (n 17 above).

[131] Shemberg (n 17 above).

[132] Faruque (n 8 above) 331.

[133] Faruque (n 8 above) 331.

[134] Faruque (n 8 above) 332.

compensation to the affected contracting party. In this way, commentators say that economic stabilisation clauses always ensure that the economic equilibrium that existed at the execution of the contract is maintained. The flexible approach of economic stabilisation clauses explains why they have gained popularity among emerging economies and developing countries.[135]

Economic stabilisation clauses are narrow in terms of scope as they restrict only the host government's making of legislation or regulations that have an adverse material effect on the mining concession.[136] In this way, they differ from stabilisation clauses *stricto sensu* in that the latter actually restrict the host state's legislative powers to enact laws that affect the concession.[137] There is no room for compromise when it comes stabilisation clauses *stricto sensu*.[138] Economic stabilisation clauses seek the balancing of interests of the contracting parties to the concession by taking into account the changes in the reality.[139] Stabilisation clauses *stricto sensu* are more radical and rigid. Consequently, they are blind to the changes in reality which are different from the ones obtaining at the time of execution of the concession.[140]

2.8.3 The legal effect of stabilization clauses *stricto sensu*

It is noted from the earlier discussion that stabilisation clauses *stricto sensu*[141] focus on freezing the host state's legislative powers. In this sense, the applicable law to the concession will be that which existed at the time of the execution of the said concession.[142] There are many legal effects of stabilisation clauses *stricto sensu.*[143]

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[135] Faruque (n 8 above) 332.

[136] Faruque (n 8 above) 332.

[137] Shemberg (n 17 above).

[138] Faruque (n 8 above) 331.

[139] Shemberg (n 17 above).

[140] Shemberg (n 17 above).

[141] Ng'ambi (n 43 above) 53 – 54.

[142] Shemberg (n 17 above).

[143] Maniruzzaman (n 20 above) 97.

(i) Nationalisation or expropriation

One of the most debated topics relates to the legal effect of stabilisation clauses *vis-à-vis* nationalisation or expropriation. Some scholars with an extreme radical view of stabilisation clauses contend that nationalisation or expropriation is not permitted by stabilisation clauses.[144] The foregoing view is premised on the concept of the sanctity of contract, *pacta sunt servanda*.[145] Accordingly, it is argued that stabilisation clauses restrict the host state from nationalizing or expropriating.[146] This was the view that the arbitral tribunal upheld in the case of *Texaco Overseas Oil Petroleum Co/ California Asiatic Oil Co v Libya.*[147] It was held in this case that the expropriation by Libya was in breach of a stabilisation clause and constituted an illegal act under international law.[148]

This *Texaco* decision has been criticized by scholars on the basis that a stabilisation clause does not diminish or take away the sovereign right of the state to expropriate.[149] The foregoing argument is based on the principle of a state's permanent sovereignty over its natural resources. It is argued that a state's sovereignty over its natural resources is an inherent right that is impeccable if exercised in public interest, good faith and a non-discriminatory manner. In this way, nationalisation is a lawful act. This view was supported by the arbitral tribunal in the case of *Libyan American Oil Co. (LIAMCO) v Libya*,[150] where the tribunal found that expropriation conducted in a non-discriminatory way and in good faith is always lawful. Similarly, in the case of A*merican Independent Oil Company (AMINOIL) v Kuwait,*[151] the arbitral tribunal supported the view that nationalization is lawful. It found that, in the absence of an express provision in a concession curtailing the state's innate right to nationalise, a stabilisation clause

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[144] Faruque (n 8 above) 325.

[145] Ng'ambi (n 43 above) 55.

[146] Faruque (n 8 above) 325.

[147] (1978) 17 ILM 1.

[148] (1978) 17 ILM 1.

[149] Faruque (n 8 above) 325.

[150] (1981) 20.

[151] (1982) 21 ILM 976.

cannot limit the right of the state to expropriate. According to the tribunal, a limitation on the state's right to expropriate is "a particularly serious undertaking which can't be inferred from the contract."[152] The tribunal, furthermore, found that stabilisation clauses should be restrictively interpreted and only construed to proscribe against state 's taking which has a confiscatory character. A stabilisation clause cannot, thus, forbid the country from exercising its intrinsic right to expropriate.[153] In this way, contractual obligations cannot (it is not good style to use contractions - don't, can't, won't, it's - in formal writing) override rules of international law, particularly the principle of sovereignty over natural resources.[154] The tribunal in the *AMINOIL* case was of the view that a stabilisation clause is only a brief limitation on the state's sovereignty to legislate or pass administrative regulations.[155]A longer duration, of over sixty years, is, thus, viewed as oppressive and unreasonable. As was rightly observed by the United Nations General Assembly on Permanent Sovereignty over Natural Resources:

> "A recurrent provision, even in very recent contracts, is the freezing of the tax regime applicable at the time of the negotiation. Some of the freezing clauses negotiated at present tie the hands of the Government for a very long period. Long and comprehensive 'freezing' clauses seem to run counter to the principle of permanent sovereignty over natural resources, although it may be conceivable that provisions to stabilise that fiscal regime for a reasonable period, so as to assure loan repayment, for example, can be found acceptable under specific conditions."[156]

Consequently, it is justifiable for the state to breach a stabilisation clause that covers a long and onerous period. Notwithstanding the foregoing, arbitration practice establishes that, where contracting parties provide for an express commitment not to alter the terms of the concession, the host government cannot raise its sovereignty to disrespect obligations acquired with respect to foreign investors.

Furthermore, it cannot, through policies based on its domestic law, terminate or substantially affect the contractual rights of the investor. Undeniably, a fair

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152 (1982) 21 ILM 976.

153 (1982) 21 ILM 976.

154 (1982) 21 ILM 976.

155 (1982) 21 ILM 976.

156 See Report of the Secretary General of the United Nations on Permanent Sovereignty over Natural Resources, U.N. DOC E/C 119 (1981).

amount of international jurisprudence reveals that a host government's promises to foreign investors have been powerfully enforceable as a matter of consistent international law and practice. Providing the justification for the above position, the arbitral tribunal in *Revere Copper & Brass, Inc. v. Overseas Private Investment Corporation (OPIC)*[157] held that:

> "under international law the commitments made in favour of foreign nationals are binding notwithstanding the power of Parliament and other governmental organs under the domestic Constitution to override or nullify such commitments."[158]

(ii) Delocalisation or internationalisation of contract

It has been argued that mining concessions are regulated by principles of international law or general principles of law as a result of the insertion of a stabilisation clause. This argument is predicated on the fact that the insertion of a stabilisation clause gives a concession some international character. Some commenters have argued that the insertion of a stabilisation clause, combined with a provision for reference of the matter for international arbitration in case of a dispute, is a strong indication of the parties' intention that the mining concession is insulated from the reach of the law of the host state.[159] Consequently, international law and general principles of law are applicable to the mining concession. In this connection, a breach or any unilateral termination of a stabilisation clause entails a breach of international law and is, therefore, a wrongful act in international law. It is contended that the presence of a stabilisation clause in a concession is undoubtedly a pointer that the parties intend to have their contractual relationship regulated by international law. This view was upheld in the case of *AGIP*.[160] Similarly, in the *Texaco* award, "professor Dupuy found that the presence of a stabilisation clause changed the legal nature of the Libyan Petroleum concessions and converted them into internationalised one".[161] The theory of delocalisation or internationalisation of mining concessions was developed the *Sapphire International Petroleum Ltd v National*

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[157] [1978] 56 I.L.R. 257.

[158] [1978] 56 I.L.R. 257.

[159] FV Garcia-Amador 'Foreign Investment in the Present and New International Economic Order' (1987) 33-34.

[160] (1982) 21 ILM 726.

[161] Faruque (no.8 above) 327.

Iranian Oil Co. (NIOC),[162] where the tribunal observed that "these concessions give the contract a particular character, which lies partly in public law and partly in private law."[163] In this way, the "contract has therefore a quasi-international character, which releases it from the sovereignty of a particular legal system."[164]

(iii) Payment of compensation and international arbitration practice

Scholars are an undivided as to need for the payment of compensation for a breach of a stabilisation clause. This is premised on the fact that, since a stabilisation clause does not restrain the state's inherent right to expropriate, it follows that a breach of it will warrant compensation.[165] By inserting a stabilisation clause in a mining concession, the host state "thus creates for the benefit of the other contracting party a legitimate expectation that has to be reflected in the propriety of indemnification when such expectation gets frustrated."[166] It is practice in international arbitration that compensation awarded for the breach of a stabilisation clause is usually in monetary form.[167] As one commentator rightly observed:

> ". . . the clause (stabilisation clause) would be valid, binding and effective if it is read to mean an undertaking by the State to indemnify the investor for any loss he incurs as a result of an action or omission attributable to the former whatever the cause of such action or omission. Such undertaking does not infringe on its sovereignty."[168]

Guidance, however, has not been offered by scholars or arbitral tribunals as to what sort of compensation is payable in the case of a breach of a stabilisation clause.[169] Some schools of thought have argued that the compensation payable in the case of breach of a stabilisation clause is *restitutio in integrum* or specific

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[162] (1967) 35 ILR 136.

[163] Sapphire (1967) 35 ILR 136.

[164] Sapphire (1967) 35 ILR 136.

[165] AFM Maniruzzaman 'Damages for breach of stabilisation clauses in international investment law: where do we stand today?' *International Energy Law & Taxation Review* (2007) 246 – 247.

[166] AFM Maniruzzaman (n 165 above) 246 – 247.

[167] AFM Maniruzzaman (n 165 above) 247.

[168] A.Z. El Chiati, 'Protection of Investment in the Context of Petroleum Agreements' (1987) IV *Recueil des Cours* 164.

[169] Faruque (n 8 above) 330.

performance.[170] Others, however, argue that the compensation payable for a breach of a stability provision takes into account actual loss suffered and future profits, as well as punitive damages.[171]

Arbitral tribunal practice seems to differ as to the determination of compensation payable to investors in cases of a breach of a stabilisation clause. For instance, in the *Liamco* award, the arbitral tribunal was of the view that the presence of a stabilisation clause in a concession was one of the material factors for the award of equitable compensation.[172] In the *Texaco* award, however, the arbitral tribunal, while agreeing that the presence of a stabilisation clause in a concession was one of the factors for the determination compensation, instead awarded the investor *restitutio in integrum* as compensation.[173] In the *Aminoil* award, the arbitral tribunal dismissed the investor's pleading for *restitutio in integrum* and rejected Libya's argument for net book value as compensation. The tribunal was of the view that the aim of an investment was to make reasonable returns from the investment based on the legitimate expectation that the state would not breach the stabilisation clause.[174] The tribunal, thus, took the view that a stabilisation clause was an imperative ingredient to be used in determining compensation.[175]

Suffice it to note that the legal consequence of a stabilisation clause as far as the degree as compensation is concerned hinges on the legislative or administrative measures taken by the host state. In this regard, how much compensation is given to the investor depends on whether the host state's measures are legal or illegal. If the host state's legislative or administrative measures are exercised in a non-discriminatory manner and in the public interest even though in breach of a stabilisation clause, compensation will be calculated on the basis of fair market value. It is important to note that Fair Market value does

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170 Faruque (n 8 above) 330.

171 Faruque (no.8 above) 330.

172 (1981) 20.

173 (1978) 17 ILM 1.

174 (1982) 21 ILM 976.

175 (1982) 21 ILM 976.

not take into account prospective profits. On the other hand, if the host state's measures are conducted in a discriminatory manner and not in public interest compensation payable for breaching a stabilisation clause in this instance takes into account actual loss suffered, future profits and punitive damages.

There is an emerging tendency nowadays of inserting the exact kind of compensation in cases of a breach of a stabilisation clause through changes in the terms of the concession or expropriation. Some concessions provide for fair and equitable compensation while others make provision for appropriate compensation.[176] Other concessions provide for full and adequate compensation.

2.9 The legal effect of stabilisation clauses in International Law

There are divided opinions among scholars and jurists with reference to the status of stabilisation clauses in customary international law.[177]The key function of stabilisation clauses is to protect the foreign investor from unilateral and arbitrary changes to the terms of the concession by the host state which makes the concession onerous. The foregoing does not mean that stabilisation clauses can refute the host's state's inalienable authority to nationalise. As was correctly observed by Professor Maniruzzaman:

> No matter what law governs the contract, either the law of the host State or international law or any other non-national law, the State's exercise of sovereign authority in the public interest cannot be denied either in the context of classic stabilization clauses (ie freezing clauses) or modern stabilization clauses.[178]

The consequences of a breach of a stabilisation clause depend on the type as established in our earlier discussion above. Furthermore, it is sufficient to note that, if a stabilisation clause is invalid in accordance with the law of the host state, international law cannot be applied to cure such invalidity.[179]

Some scholars have argued that a stabilisation clause is an autonomy ingredient of international law. They, thus, contend that a stabilisation clause is rooted in international law regardless of the law governing the contract as a whole.[180] Weil clearly argues that "the

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[176] Faruque (no.8 above) 332.

[177] FV Garcia-Amador, 'State responsibility in case of ''Stabilization'' clauses' (1993) 2 *Journal of Transnational Law and Policy* 23.

[178]Maniruzzaman (no. 1 above) 138.

[179]Waelde and Ndi (no.2 above) 242.

[180] Maniruzzaman (n 1 above) 138. See also SL Garcia-Amador and H Baxter *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974) 67.

legal relationship arising out of an investment and the law governing the relationship is a matter within the international legal order".[181] The foregoing view was supported by the Arbitral tribunal in the Texaco Overseas Petroleum Company v Libya award.[182] The arbitral tribunal established that "contracts between States and private persons can, under certain conditions, come within the ambit of a particular and a new branch of international law: the law international law of contracts."[183]Implicitly this seems to suggest that stabilisation clauses are governed by international law despite the host state and the investor agreeing that the mining concession will be governed by the law of the host state.[184]

2.10 Conclusion

The management of risk, especially political risk, is the rationale behind the persistence by foreign investors for the insertion of stabilisation clauses in mining concessions. Stability clauses are "contractual clauses in private contracts between investors and host states that address the issue of changes in law in the host state during the life of the project".[185] Their purpose, depending on their type, is meant either to restrict the host state from changing the terms of the concession through its legislative actions or to maintain an economic equilibrium is cases where the host state changes the terms of the contract resulting in a material adverse effect.[186] Stabilisation clauses are inserted in a mining concession based on the mutual consent of the contracting parties and, as such, they are valid at law.[187] The presence of a stabilisation clause in a concession does not, however, prevent the host government from enacting laws that are inconsistent with its commitments in the said concession.[188] Hence, the usefulness of a stabilisation clause can be said to be only a psychological boost for foreign investors.[189] Host countries act contrary to their commitments in the concessions because

[181] P Weil 'The State, the Foreign Investor, and the International Law: The No Longer Stormy Relationship of a Ménage 'A Trois' (2000) 15 *ICSID Review-Foreign Investment Law Journal* 406.

[182] (1977) 53 ILR 389.

[183](1977) 53 ILR 447-448.

[184] Maniruzzaman (n 1 above) 139.

[185] Shemberg (n 17 above).

[186] Mato (n 28 above) 33.

[187] Ng'ambi (n 43 above) 53 – 54.

[188] Mato (n 28 above) 34.

[189] C Madumere 'Balancing Stabilisation Clauses with Human Rights Obligations under International Law' https://www.pressreader.com/nigeria/thisday/20160105/281857232518006 (accessed 18 September 2017).

they feel that they do not benefit from their natural resources. Furthermore, they feel that the presence of stabilisation clauses in concessions is an impediment to their sovereignty to legislate or change laws in the best interest of their people. It is this argument that renders the insertion of stabilisation clauses in concessions problematic. Stabilisation clauses, though they provide efficiency to the concession by creating a stability and predicable contractual regime, are very rigid and lack flexibility to encompass unforeseen changes that affect the viability of the contract at the time of the signature of the concession. In order to achieve contractual flexibility in long-term concessions, there is need for the contracting parties to include renegotiation and adaption clauses in concessions. Thus, the study will now then turn to the next chapter to discuss renegotiation and adaptation clauses in long-term concessions.

CHAPTER THREE

RENEGOTIATION AND ADAPTATION CLAUSES IN LONG-TERM CONCESSIONS

3.1 Introduction

In the previous chapter, this paper discussed the concept of stability and predictability of contract in the context of stabilisation clauses. Stabilisation clauses in long-term concessions, however, pose serious challenges in the relationship between the host state and the foreign investor owing to their rigidity. They do not take into account future circumstances that may adversely affect the concession, such as a fall in commodity prices and geological and technical risks, among others. Most importantly, stabilisation clauses fetter the sovereign prerogatives of the host country with regard to legislation or change in its fiscal policies. It is in this regard that most host states, particularly developing countries, consider stabilisation clauses to be a barrier to economic development and legislative progress.

Increasingly, however, there is a paradigm shift among International Investment Law scholars and commentators in the art of drafting of long-term concession contracts.[1] They seek not only to achieve contractual efficiency but also contractual flexibility through the inclusion of renegotiation and adaptation clauses in mining concessions. Renegotiation clauses are clauses which provide that, in the event of a essential change of circumstances surrounding the mining concession, the contracting parties are at liberty to renegotiate the provisions of the concession.[2] This is particularly vital in cases where the concession is adversely affected so as to reinstate the economic equilibrium that existed at the time of contracting.[3] This chapter focusses on the nature, scope and legal efficacy of renegotiation and adaptation clauses in mining concessions. It also discusses, among other things, the conceptual, theoretical and practical advantages of a flexible long-term approach to contract negotiation rather than a short-sighted approach with far-reaching consequences on the occurrence of unforeseeable events.

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[1] HT Mato 'The Role of Stability and Renegotiation in Transnational Petroleum Agreements' (2012) 5 *'Journal of Politics and Law'* 33.

[2] Mato (n 1 above) 33.

[3] SP Ng'ambi *Resource Nationalisation in International Investment Law* (2016) 130-131.

3.2 Definition of renegotiation and adaptation clauses

Renegotiation and adaption clauses, though similar when construed from a broader perspective, are legally different. Faruque defines a renegotiation clause as "a consensual process of change in the terms and conditions of the contract in order to redefine the rights and obligations of the parties under the contract in a changed context."[4] From the foregoing, it could be said that the unilateral imposition of renegotiation by the host state is inconsistent with the nature of renegotiation which is consensual.[5] Such a kind of renegotiation is called forced renegotiation. The rationale behind renegotiation is the mutual consensus of the contracting parties aiming at revising the terms of the contract in order to achieve economic equilibrium.[6] Renegotiation can be realised either through a process that is expressly prescribed in a concession or in extra-contractual procedures that are normally acceptable and approved in the legal system applicable to that contract.[7] Generally, procedures for renegotiation are not prescribed in contracts as such parties mutually agree beforehand on the procedures to be followed.[8] Some concessions do, however, make provision for the procedures to be followed by the parties in the case of renegotiation. In such instances, the parties are religiously bound to apply the procedures so prescribed. The legality and validity of the prescribed procedure stem from the fact that the parties mutually consented to it at the conclusion of the contract. [9]

In order to bring the whole process of intra-contract renegotiations fully to a logical end, contracting parties must insert an adaptation clause in the concession.[10] A contract renegotiation clause compels the contracting parties to revise or look again at the terms of the concession when a fundamental change of circumstances occurs thereby affecting the

[4] A AL Faruque 'Renegotiation and Adaptation of Petroleum Contracts: The Quest for Equilibrium and Stability' (2008) 9 *Journal of world Investment and Trade* 120.

[5] AL Faruque (n 4 above) 120.

[6] AL Faruque (n 4 above) 120.

[7] AL Faruque (n 4 above) 120.

[8] AL Faruque (n 4above) 120.

[9] AL Faruque (n 4 above) 120.

[10] JW. Salacuse 'Renegotiating International Project Agreements'(2001) *24 Fordham International Law Journal* 1334.

contractual benefits of the concession. On the other hand, a contract adaptation clause requires:

> that on the happening of certain specified events the parties will first seek to negotiate a solution and, failing that, refer their problem to a third party for either a recommendation or a binding decision, depending on the desire of the parties to the contract.[11]

From the foregoing, it can be seen that adaptation of the terms of a concession comes into play only after a failed negotiation process as a root to finalise a negotiation process through a referral to a third party. In this instance, the third party may an international institution, such as the World Bank centre for the settlement of investment disputes or the International Chamber of Commerce.[12] These international institutions have developed rules and facilities to help contracting parties to carry out the contract adaptation process.[13]

The expression 'adaptation' may be applied from a narrow or broader perspective. In a narrow perspective, it infers adjustments to the terms of the contract through a number of adaptation clauses. In a broader sense, however, adaptation 'implies readjustment of the contractual relationship which can be achieved by both renegotiation and adaptation clauses.'[14] Adaptation clauses permit changes in the contract by following fixed procedures. The intention of adaptation clauses is for the filling of gaps in concessions.

There are a number of distinguishing features between renegotiation and adaption clauses. Firstly, while renegotiation process is mostly characterised by lengthy consultations and a review of the whole situation leading to the change of circumstances, an adaptation process is the narrow perspective, is less time consuming, and is carried out through fixed procedures. Secondly, more significantly, "the renegotiation clause often deals with external events to contracts, adaptation clauses deal with problems of a more contractual nature involving technical or financial difficulties."[15] Thirdly, renegotiation is more visibly directed

[11] Salacuse (n 10 above) 1334.

[12] Salacuse (n 10 above) 1334.

[13] Salacuse (n 10 above) 1334.

[14] AL Faruque (n 4 above) 120.

[15] AL Faruque (n 4 above) 120.

to a material adverse change of the contract and points more plainly to the process of the common effort of the contracting parties than to the result.[16]

3.3 Salient features of long-term concessions

Long-term concessions, unlike normal contracts, are unique in character because of the period they cover. Some of the notable salient features of these contracts include the fact that they are of long duration and they are high capital intensive and high-risk operations.[17]

One of the salient features of mining concessions is their long-term character. The long-term nature of concessions in mining or petroleum makes them vulnerable to disturbances from "unforeseeable events or events which the parties – for whatever reason - did not and perhaps could not, deal with in the contract with sufficient time and in sufficient detail."[18] The longer the period of the agreement, the more it is susceptible to be vulnerable owing to geological, commercial and political risks. Such risks make the contract onerous for one or both contracting parties.[19] The option obtainable in such instances is for the affected party to withdraw from the contract or request a revision of the contractual terms. Parties to these long-term agreements, however, seldom desire a complete discharge of the concession owing to the enormous capital injection and material equipment invested in the project. For the foregoing reasons, contracting parties would want to renegotiate the contract so as to salvage it. In this way, the parties would want to restore the economic equilibrium that existed at the time of conclusion of contract. Hence, renegotiation clauses provide an avenue that is crafted by the parties to revise the contractual terms in the event of economic storms.

Furthermore, the activities associated with this kind of contract require long term commitments owing to the unique nature of the contracts. The activities covered by these concessions range from exploration to development and, beyond, to decommissioning.[20] The

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[16] N Horn 'The concept of adaptation and renegotiation in the law of transnational commercial contracts' in N Horn (ed) *Adaptation and Renegotiation of Contracts in International Trade and Finance: Studies in Transnational Economic Law 3* (1985) 6.

[17] Mato (no.28 above) 33.

[18] A Kolo and TW. Walde 'Renegotiation and Contract Adaptation in International Investment Projects Applicable Legal Principles and Industry Practices' (2000) 1 The Journal of World Investment 5.

[19] Kolo and Walde (n 18 above) 5.

[20] MO Igiehon and FK Altit 'Decommissioning of upstream oil and gas facilities' http://www.globelawandbusiness.com/OG/sample.pdf (accessed 20 September 2017).

foregoing stages cover considerable periods of time for the project to be successful.[21] The second noticeable feature of long-term concessions is that they are capital-intensive concessions.[22] This stems from the fact that huge amount of capital is required particularly in the initial stages of the project when the returns are mostly zero. In such instances, the foreign investors would seek loans from financial institutions, both national and international, such as banks in order to maintain the operations of the project. The third salient feature of long-term contracts is that they are high risk operations.[23] The risk involved in these concessions includes, but is not limited to geological, technical, managerial, commercial, natural disaster risks, price volatility and, above all, political risks.[24] The management of the above risks is what foreign investors achieve through the inclusion of stability clauses, insurance, etc.

3.4 Stability vs flexibility

There is normally a conflict between the desire for contractual stability and contractual flexibility.[25] While foreign investors usually insist on stability and a predictable contractual regime, the host countries, particularly developing states, seek a flexible and amendable approach to long-term concessions.[26] This conflict is as a result of the two contracting sides having different goals with regard to the investment. For the host countries, the purpose of attracting foreign investment in the mining sector is for economic growth and development in order to improve the living standards of its citizens. For the foreign investor, however, the purpose of the investment is to make as much profit as possible and reduce costs and other risks that may impede the profitability of the project.

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[21] J Macedo 'From Tradition To Modernity: Not Necessarily An Evolution - The Case Of Stabilisation And Renegotiation Clauses' http://www.dundee.ac.uk/cepmlp/gateway/files.php?file=cepmlpcarl4_25 (accessed 20 September 2017).

[22] Mato (n 1 above) 33.

[23] A Newcombe 'Regulatory Expropriation, Investment Protection and International Law'

http://italaw.com/documents/RegulatoryExpropriation.pdf (accessed 20 September 2017). See also Mato (n 1 above) 33.

[24] A Newcombe 'Regulatory Expropriation, Investment Protection and International Law'

http://italaw.com/documents/RegulatoryExpropriation.pdf (accessed 20 September 2017).

[25] Mato (n 1 above) 33. See also Kolo and Walde (n 18 above) 7.

[26] Mato (n 1 above) 33.

3.4.1 Stability in contract

The need for stability in an international mining contract is considerable. Investors in the mining sector would want proper and well-established safeguards that their investments are safe and stabilized.[27]

Once a stabilisation clause is inserted in a concession, the foreign investors would insist on the strict adherence of the same based on the principle of sanctity of contract *(pacta sunt servanda)*.[28] This is a fundamental principle of law that states that obligations arising from a contract must be respected.[29] It firmly propounds the sanctity of contract. Sanctity of contract is a concept that was developed on the contractual theory of Aristotle. According to the Aristotelian virtue, a concession is an expression of the parties' free will or choice.[30] So, contracting parties enter into concession as an exercise of the expression of the parties' freedom and autonomy.[31] As such, the parties must respect the contract and all the obligations therein. In this way, this theory insists on respecting the contract despite any onerous terms.[32] This is because parties enter into it on the basis of free will.[33] The theory further states that an individual is the best judge of his or her own interest and if he or she strikes a raw deal, he or she can only hold himself or herself to blame. The court or the state is not allowed to interfere with the contract in order to pursue fairness or justice.

Though an International Law Principle, *pacta sunt serva*nda has been recognised in the place of long-term concessions.[34] It is worth noting that this principle is not absolute.[35] All legal regimes in the world acknowledge the fact that a party to a contract may be excused from performing contractual obligations under certain exceptional circumstances.[36] Under a Common Law regime, for instance, parties are permitted relief from contractual liability

[27] ZA Al Qurashi 'Renegotiation of International Petroleum Agreements Renegotiation of International Petroleum Agreements' (2005) 22 *Journal of International Arbitration* 262.

[28] Ng'ambi (n 3 above) 55.

[29] Ng'ambi (n 3 above) 55.

[30] Kolo and Walde (n 18 above) 7- 8.

[31] Kolo and Walde (n 18 above) 7- 8.

[32] J Carter 'The Renegotiation of Contracts' (1998) 13 *Journal of Contract Law* 185.

[33] Kolo and Walde (n 18 above) 7- 8.

[34] Mato (n 1 above) 34.

[35] Mato (n 1 above) 34.

[36] Kolo and Walde (n 18 above) 8.

under the doctrine of frustration. [37]Furthermore, "under Islamic Law regime, the Imam has the right to terminate agreements with other parties if he finds that the terms are harmful to the interest of the Islamic community."[38] Suffice it to note that proper prior notice to the other party is critical before the contract is terminated. The same is the case under the French Law regime, where "excuse from performance of contractual obligations is recognized in cases of impossibility."[39]

3.4.2 Flexibility through renegotiation clauses

Uncertainties regarding the legal efficiency of stabilisation clauses and the host countries' desire to reserve their sovereign prerogatives have brought about the formulation of a new technique for a flexible and amendable approach to long-term concessions. The flexible approach entails that, if future laws and regulations enacted by the host government should affect the economic viability of the contract, negotiations shall be entered into in good faith with the view to restoring the economic equilibrium that existed before.[40] For, as Mato correctly submits:

> 'the renegotiation clause may offer both parties protection against the hardship caused to either of them by a change of those circumstances which were present at the time of the conclusion of the agreement.'[41]

In this instance, renegotiation clauses ensure that:

> any law, regulation or any other government act subsequent to the original contract that negatively affects the investor's contractual interests will entitle him the right to request for the contract renegotiation and that the host country will have the obligation of entering in such renegotiations in good faith.[42]

The foregoing visibly shows how flexible renegotiation clauses are.[43] They allow contracting parties to make adjustments so making the concession more responsive to the changes in circumstances uncontemplated by the parties at the signature of contract. The foregoing is premised on the fact that, usually, investment contracts are based on assumptions relative to the rate of returns, the geological area, labour, the costs associated with compliance with

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[37] Al Qurashi (n 27 above) 272.

[38] Mato (n 1 above) 34. See also Al Qurashi (n 27 above) 275.

[39] Mato (n 1 above) 34. See also Al Qurashi (n 27 above) 272.

[40] Ng'ambi (n 3 above) 13o - 135.

[41] Mato (n 1 above) 35.

[42] Mato (n 1 above) 35.

[43] Ng'ambi (n 3 above) 130.

international and domestic environmental standards, the taxation rate and other financial charges to the host state.[44] It is sufficient to note that these assumptions are highly speculative and inaccurate. It is, thus, not economically viable to freeze the rights of the parties to renegotiation on the principle of seeking contractual stability. Contracting parties to long-term concessions need the flexibility to deal with changes that fundamentally damage the assumptions underlying the original concession.[45] The idea is to make the contractual relationship between the parties manageable and relevant to the changes in the economic environment in which the concession is operating. It has been said that:

> it is idle to freeze the position of the parties for long periods to conditions that become so out of date. Either parties will include renegotiation provisions in their contracts or they will act as if they were there.[46]

It is worth noting that, while contractual stability is desirable, a flexible and amendable approach to a contract is imperative. This leads to an interrogation of the differences between stabilisation and renegotiation clauses.

3.4.3 Differences between stabilisation and renegotiation clauses

Stabilisation and renegotiation clauses differ in many ways. On one hand, a stabilisation clause aims at freezing the law so as to "keep the original balance alive throughout the contract".[47] A renegotiation clause, on the other hand, aims at keeping the relationship alive by 'requiring the parties to strike a new balance whenever there are circumstances justifying a change in the original obligations of the contract'.[48] In this view, a stabilisation clause seeks the stability and predictability of a contract as a way to achieve contractual efficiency.[49] A renegotiation clause, on the other hand, seeks contractual flexibility by allowing the contracting parties to adjust their contractual relationship when there is a change of circumstances affecting the contract.[50]

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[44] Al Qurashi (n 27 above) 264.

[45] Al Qurashi (n 27 above) 265.

[46] D Vagts 'Coercion and Foreign Investment Rearrangements' (1978) 72 *American Journal of International Law* 22.

[47] M Sornarajah *The Settlement of Foreign Investment disputes'* (2000)53.

[48] Sornarajah (n 48 above) 53.

[49] Ng'ambi (n 3 above) 130 – 135.

[50] S Ng'ambi 'Stabilisation Clauses and the Zambian Windfall Tax' (2000) 1 *Zamia Social Science Journal* 116.

3.5 The scope and legal nature of renegotiation clauses

3.5.1 The scope of renegotiation clauses

The scope of renegotiation of mining concessions may differ extensively conditional upon the circumstances of each case and the scope of discrepancy among the parties on the issues involved.[51] It is stated that 'the scope of renegotiation may be as broad as to cover the revision of whole contracts or it may be narrow requiring change of only a specific provision or provisions of the contract'.[52]

3.5.2 The legal nature of renegotiation clauses

The validity of renegotiation clauses is founded on the fact that contracting parties insert them in concessions by mutual agreement.[53] Consequently, these clauses represent the freedom and autonomy of the parties to contract.[54] Renegotiation clauses obligate contracting parties to negotiation when there is a change of circumstances that affect the economic equilibrium envisaged in the contract.[55] The obligation to renegotiation envisages that the parties will do the same in good faith[56], fairly and with utmost seriousness because the obligation itself stems from the concession.[57]

The above notwithstanding, it must be noted that the obligation to renegotiate contractual terms "does not imply an obligation to reach an agreement".[58] For, as Al Faruque correctly observes:

> It is a well-established principle that an obligation to renegotiate a contract obligates the parties only to negotiate (*obligation de moyens*), but it does not imply an obligation to reach an agreement (*obligation de resultat*).[59]

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[51] AL Faruque (n 4 above) 121.

[52] AL Faruque (n 4 above) 121.

[53] AL Faruque (n 4 above) 129.

[54] AL Faruque (n 4 above) 129.

[55] Ng'ambi (n 4 above) 149. See also Salacuse (n 10 above) 1334.

[56] KP Berger 'Renegotiation and Adaptation of International Investment contracts: The role of contract drafters and arbitrators' (2003) 36 *Vanderbilt Journal of Transnational Law* 1360 to 1367.

[57] Ng'ambi (n 3 above) 149.

[58] AL Faruque (n 4 above) 129. See also Ng'ambi (n 3 above) 149. Salacuse (n 10 above) 1334.

[59] AL Faruque (n 4 above) 129.

International state practice as evidenced in long-term concessions reveals that renegotiation clauses compel contracting parties to make all possible endeavours to reach an agreement but it does not actually mandate them to actually reach one. The obligation is, therefore, to negotiate but not to reach an agreement. The foregoing position was supported by the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ). In the *Railway Traffic between Lithuania and Poland*,[60] the Permanent Court of International Justice (PCIJ) in its advisory opinion found that parties' obligation under a renegotiation clause:

> ...is not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements. But an obligation to negotiate does not imply an obligation to reach an agreement, nor in particular does it imply that Lithuania, by undertaking to negotiate, has assumed an engagement and is in consequence obliged to conclude the administrative and technical agreements indispensable for the re-establishment of traffic on the Landwarow-Kaisiadorys railways sector.[61]

In the same vein, the International Court of Justice (ICJ), in the case of the *Federal Republic of Germany Denmark and the Netherlands* commonly known as the *North Sea Continental Shelf case*[62]*,* had this to say:

> The parties … are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.[63]

The above was concisely highlighted by the tribunal in the *AMINOIL* award where it held that "an obligation to renegotiate is not an obligation to agree".'[64]

From the foregoing decisions, renegotiation at the international level is regarded as a very important technique and not just a process.[65] Hence, contracting parties to long-term concessions must endeavour to do the best possible to reach an agreement and not simply to treat the process as a mere formality. There are different norms that are used to define the

[60] (1931) Series A/B No. 42 http://www.worldcourts.com/pcij/eng/decisions/1931.10.15_traffic.htm (accessed 20 September 2017). See also AL Faruque (n 4 above) 129.

[61] (1931) Series A/B No. 42, at 116.

[62] (1969) Icj Rep. 4.

[63] (1969) Icj Rep. 4, para. 85, at 47.

[64] 24 ILM (1982) 976.

[65] Ng'ambi (n 3 above) 1.

best endeavour. Some of the terms used to define best endeavour include, but are not limited to:

> good faith and commitment to the fulfilment of the parties' obligations towards renegotiation, which include a willingness of the parties to negotiate and consider the needs and interests of the other party, the demonstration of flexibility in mutual demands, and the sharing of relevant information between the parties.[66]

The above quotation clearly gives the true direction that the international contract law regime has taken on the subject matter. Parties need to engage in renegotiation with a right attitude of reaching an agreement.

Now, what happens if one party to the concession refuses to engage in renegotiation? This issue may be tackled from two perspectives. Where a concession expressly provides for renegotiation when the trigger events are met, refusal to renegotiate will be regarded as a breach of contract and the affected party is entitled to damages.[67] This is because a renegotiation clause is a term of the contract. Where the concession, however, does not make express provision for renegotiation, it is submitted that no breach of contract will be occasioned for refusal to renegotiate the terms of the contract.[68]

Nevertheless, mere failure "to reach an agreement is not a breach of contract because there is no obligation on the parties to reach an agreement".[69] A party cannot, therefore, have recourse for an unsuccessful renegotiation. That notwithstanding, a failed renegotiation will be construed as being a breach of contract if a party can prove that the other party did not act in good faith.

The above principles have been well discussed in the *Wintershall AG and all v Qatar*[70] arbitral award. The salient facts of this case are that *Wintershall AG and all v Qatar* (hereinafter called 'the claimants') had discovered natural gas in Qatar during an exploration. As such, they presented a proposal for the joint development venture to the Government of Qatar (hereinafter called 'the Respondent'). The respondent, however, rejected the proposal. This prompted the claimants to bring arbitration proceedings against the respondent alleging

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66 AL Faruque (n 4 above) 129.

67 Berger (n 56 above) 1364- 1365.

68 AL Faruque (n 4 above) 129.

69 Berger (n 56 above) 1364- 1365. See also P Bernardini 'The Renegotiation of the Investment Contract' (1998) 13 *ICSID Review-Foreign Investment Law Journal* 419.

70 (1989) 28 ILM 795.

that the respondent had breached the concession by rejecting the proposal. It was the claimants' contention that the respondent had an obligation to negotiate in good faith for a gas utilisation plan. The arbitral tribunal held that:

> Even accepting the view that there was a duty to negotiate in good faith, it is clear that such a duty does not include an obligation on the part of the respondent to reach agreement with respect to the proposals made by the claimants.[71]

The tribunal also held that the contracting parties "did not enter into further contractual arrangements for the utilisation of non-associated natural gas by virtue of such clause and there was not a violation by the respondent of any duty to negotiate in good faith regarding this matter".[72]

3.6 Types of renegotiation clauses

There are different kinds of renegotiation clauses that are employed at different stages during and outside the lifetime of a concession. Salacuse identifies three kinds of renegotiations and calls them as Post-contract, Intra-contract and Extra-contract renegotiations.[73] The foregoing categorisation signifies the three stages at which renegotiation would take place during and after the contract.

3.6.1 Post-contract renegotiations

As the name suggests, these are renegotiations that take place owing to the effluxion of time of a contract. A concession, just like any other contract, is of fixed duration with an ascertained expiration.[74] At the expiration of contract, contracting parties have two options available to them. The first option is for the parties to go their separate ways, and the second option is for them to renegotiate the expired contract in order to resuscitate it. At first glance, this kind of renegotiation resembles the negotiation of the original contract, but they are different, and they involve different strategies.[75] Furthermore, the factors underlying the need for such negotiations are far apart.

[71] (1989) 28 ILM 814.

[72] (1989) 28 ILM 814.

[73] Salacuse (n 10 above) 1320.

[74] JW Salacuse *The three Laws of International Investment: National, Contractual, and International Frameworks for foreign Capital* (2013) 277.Also see Salacuse (n 10 above) 1320.

[75] Salacuse (n 74 above) 276- 277.

3.6.2 Intra- contract renegotiation

Intra- contract renegotiations usually happen during the subsistence of the contract, and the contract itself expressly provides that, at specific intervals or on the happening of an event that affects the economic evenness of the concession, the parties should renegotiate the terms.[76] In this instance, this kind of renegotiation may be called renegotiation *stricto sensus*. The main thrust of this chapter will be based on this kind of renegotiation clause. Intra-contract renegotiations are called such because they occur within the legal environment established by the original contract itself. As Salacuse observes, "here renegotiation is anticipated as a legitimate activity in which both parties, while still bound to each other in a valid contract, are to engage in good faith negotiations".[77]

3.6.3 Extra- contract renegotiation

This kind of renegotiation is said to be the most stressful and difficult as it occurs outside the contractual framework of the existing contract.[78] Here one of the contracting parties tries to request a renegotiation of the existing contract without that contract having an express provision to do that.[79] In this way, extra-contract renegotiation is properly so called because it occurs without the contract sanctioning such an act. In a way, the party seeking renegotiation tries to import terms that are not in the original contract.

3.7 The fundamental reasons for renegotiation

The reasoning behind the call for renegotiation and adaptation adjustments of a long-term concession stems from its uncertainty due to the incompleteness of the contract. This is attributable to the vulnerability of the long-term concession in relation to a change…"?) vulnerability to a change in circumstances as a result of the highly fluid and unpredictable international economic environment in which they operate.[80] The incompleteness associated with a long-term concession is due to the uncertainty related to such contracts and the necessity of ensuring justice.[81]

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[76] Salacuse (n 74 above) 277.

[77] Salacuse (n 74 above) 277.

[78] Salacuse (n 74 above) 277.

[79] Salacuse (n 74 above) 277.

[80] AL Faruque (n 4 above) 115.

[81] AL Faruque (n 4 above) 115.

3.7.1 Fundamental change of circumstances

The stating point is that the renegotiation of an existing concession is a general reflection of fundamental changes in the economic circumstances affecting the economic equilibrium of the concession.[82] A change of circumstances affecting the concession is an inevitable occurrence associated with long-term contracts.[83] It is important to add that the change of circumstances may render the performance of the concession either fully or partially impracticable.[84] This fundamental change in the economic environment of the concession is called *clausula rebus sic stantibus*.[85] It is worth noting that the principle of *clausula rebus sic stantibus* is a limitation to the principle of *pacta sunt servanda*.[86] This concept is largely a recognised international law principle which acknowledges the basis for eventual contractual adjustments and even the termination of the concession in the case of a change in the fundamental condition on which the agreement was premised.[87]

It should be noted that various legal regimes have dealt with the concept of *clausula rebus sic stantibus*. Under international law, the principle of *clausula rebus sic stantibus* is dealt with under Article 62 of the Vienna Convention on the law of treaties of I969. The said Article 62(1)[88] provides that a State may withdraw from a treaty in circumstances where:

> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

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[82] TW Walde 'Permanent Sovereignty over Natural Resources: Recent Developments in the Mineral Sector' http://onlinelibrary.wiley.com/doi/10.1111/j.1477-8947.1983.tb00265.x/pdf (accessed 22 September 2017).

[83] AL Faruque (n 4 above) 115. also see Ng'ambi (no.43 above) 136 -137.

[84] Ng'ambi (n 3 above) 136.

[85] Mato (n 1 above) 35.

[86] Ng'ambi (n 3 above) 137.

[87] TW Walde 'Revision of Transnational Investment Agreements: Contractual Flexibility in Natural Resources Development' http://wwwjstor.org/stable/40175798. (accessed 22 September 2017).

[88] Vienna Convention on the law of Treaties of I969. See also the Article 5 of the UN Draft Code of "Conduct for Transnational Corporations UN-ECOSOC 1979 Transnational Corporations: Codes of Conduct, Formulations by the Chairman which is reprinted in N Horn (ed) Legal Problems of Codes of Conduct for Multinational Enterprises (1980)." Article 5 of the Draft Code states that a corporation can request renegotiation of agreements in instances: "marked by duress, or clear inequality between the parties, or where the conditions upon which such a contract was based have fundamentally changed, causing thereby unforeseen major distortions in the relations between the parties and thus rendering the contract unfair or oppressive to either of the parties. Aiming at ensuring fairness to all parties concerned, review or renegotiation in such situations should be undertaken in accordance with applicable legal principles and generally recognised legal practices." (493–494).

The State may be allowed to withdraw from the treaty only provided that the circumstances were unforeseen. Article 62(2), however, prohibits a State from invoking the provision of Article 62(1) to withdraw from the treaty where the breach is a direct consequence of a breach committed by the invoking party, nor does it apply in instances where the treaty involves the establishment of a boundary.

In the same vein, the UNIDROIT principles of International Commercial Law (hereinafter called 'UNIDROIT Principles') makes provision under Articles 6.2.1-2 and 7.1.7 for a party to a contract to be excused from performance in instances of hardship and *force majeure*. Furthermore, Article 79 of the Convention of International Sale of Goods (CISG) makes provision for excuses for non-performance.

3.7.2 Incompleteness of contract

Mining concessions, just like any other long-term contracts, cannot be perfectly drafted so as to take care of all the future storms that are an inevitable consequence of these kinds of contract.[89] Human prediction of the future is very limited and so certain future events will not be captured and included in a contract. For, as Waelde and Ndi correctly put it:

> Life is inherently uncertain and can neither be completely predicted nor squeezed into a human plan for eternity. Nevertheless, it is the time-honoured tradition of lawyers to try to regulate the behaviour of the parties to a deal in extreme detail and for a very long period. There may sometimes be excessive zeal on the part of lawyers wishing to "play God" with contract drafting under the illusion that the draftsman can draft away all the vagaries of the future.[90]

In a similar manner, Williamson elucidates 'the incompleteness of long term contract by the concept of 'bounded rationality', which holds that there are inherent limitations upon human foresight, cognition, and calculative ability.'[91]

Long-term concessions are mostly concluded on the basis of projections and, as such, they are highly speculative in nature. This is due to the complexity and uncertain nature of long-term concessions.[92] In this respect, it is unlikely that the contracting parties can imagine and draft all possible incidences that may adversely alter their reasonable economic expectations. In the same vein, Faruque observes that 'the limited ability of the parties to

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[89] AL Faruque (n 4 above) 115 -116.

[90] TW Walde and G Ndi 'Stabilizing International Investment Commitments: International Law Versus Contract Interpretation' (1996) 31 *Texas International Law Journal* 220.

[91] OE Williamson *The Mechanisms of Governance* (1996) 6.

[92] AL Faruque (n 4 above) 116.

predict all future situations and to anticipate the parties' rights and obligations in those situations often compels them to leave the certain terms of the petroleum contract open'[93]. Hence, long-term concessions are naturally drafted without certainty and, as such, they are said to be incomplete. An incomplete contract has been defined as a contract which "will be silent about the parties' obligations in some states of the world and will specify these obligations only coarsely or ambiguously in other states of the world."[94] They are drafted in an open style to accommodate future eventualities. In this way, as the contract continues to subsist, the contracting parties may make certain adjustments to the terms of the concession in order to fill in the gaps left when drafting the original concession. The rationale is to make the concession relevant to the parties despite the changes in time. By so doing, the contracting parties make the concession a living document that is not static to onerous provisions but one that is relevant to a change of circumstances beyond their contemplation and control.

3.7.3 Perceptions of initial unfairness

Most host states, particularly developing countries, are usually not capable of shouldering the high risks and huge financial outlays associated with long-term concessions like exploration, developing, exploitation and decommissioning. The foregoing processes require a huge financial outlay which most developing states are not willing to provide owing to budgetary constraints.[95] As a result, host countries leave such ventures in the hands of foreign investors to undertake the projects. At this stage, host states are weaker negotiators than the foreign investors because they are desperate to have investors to develop the sector which they themselves cannot do.

Once the foreign investor undertakes the project, develops it and returns manifest, host states would want the concession to be revised owing to perceptions of initial unfairness. They begin to feel that the concession was badly concluded and that the state is not benefitting from it. As a result, the host state would request a renegotiation of the concession in order to make the concession fair. This request for renegotiation at this stage is not frequently well received by foreign investors who may, at the time, be enjoying the profits of the contract.

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93 AL Faruque (n 4 above) 116.

94 O Hart *Firms Contracts and Financial Structure* (1995) 23.

95 AL Faruque (n 4 above) 117.

At this point, however, there is a huge shift in terms of bargaining power from the foreign investor to the host nation. This is because the project is operating and the host state is ready to threaten expropriation if it continues to suffer loss of revenue. On the other hand, the investor would have invested a huge sum of money and other forms of investment simply to abandon them. In this respect, renegotiation becomes an inevitable avenue for the survival of the concession.[96]

3.7.4 Divergent cultural attitude and political ideology

It is worth noting that renegotiation is a necessary consequence of life itself. It may be instigated by the cultural, political, social, legal and religious ideologies that contracting parties hold.[97] These are habitually manifested as the contractual rapport subsists and the concession is adversely affected by external forces unforeseen at the date of signature of the concession.[98]

For instance, the western countries firmly believe in the sacredness of contract. Their belief in the sanctity of a contract is fuelled by the fact that a concession represents written intentions of the parties summed up in a document. According to the western ideology, what is written in a contract should be what will govern the parties' contractual relationship.[99] In this view, the relationship that subsists between the parties is the one that is documented in the concession which sets out the rights and obligations to be strictly adhered to.

The western countries' ideology of contract is far apart from the ideology of the Far East and Asian countries. According to the Far East and Asian countries, a concession is not a relationship itself but a manifestation of the interest for co-existence. They seek to keep business relationships even amidst conflicts and adverse circumstances.[100] It is the concession that brings about a business relationship which is to be performed through continued adjustments. Consequently, they assume that long-term relationships include an implied

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[96] O Lando 'Renegotiation and Revision of International Contracts: An Issue in the North-South Dialogue' (1980) 23 *German Yearbook of International Law* 42.

[97] AL Faruque (n 4 above) 115 -117.

[98] Al Qurashi (n 27 above) 268.

[99] Al Qurashi (n 27 above) 268.

[100] Sornarajah (n 47 above) 55. See also L Pye 'Chinese Negotiating Style: Commercial Approaches and Cultural Principles' (1992).

obligation of flexibility and an adjustment of the relationship and a commitment to renegotiate the terms of the concession in cases of economic hardship.

3.7.5 Change of competitive position

Sometimes the need for a renegotiation may be triggered where one of the contracting parties gives or accepts terms and conditions in another concession that differ from the party's concession. In this instance, the affected party may seek renegotiation.

3.8 Objective of renegotiation and adaptation clauses

The renegotiation and adaptation clauses must clearly stipulate the objective of the contracting parties in order to avoid future contractual uncertainty. The foregoing is imperative owing to parties having divergent objectives in the renegotiation and adaptation processes. [101] The host country may request a renegotiation because of the changes in the economic and political environment. It may also request for renegotiation because of political pressure from the opposition, Non-Governmental Organisation (NGOs), environmentalists, a perception of unfairness and imbalances in the economic equilibrium of the concession.

Renegotiation by the host government may also be triggered by high levels of poverty coupled with a perception that it is not benefitting from the deal.[102] Additionally, the host country may request renegotiation in order to implement an ideology of control and participation in the industry or to gain access to new technology.[103]

On the other hand, foreign investors may request renegotiation of the concessional terms particularly in circumstances where the performance of the concession is onerous. This may arise probably in a situation where the cost of carrying out the project is far higher than the benefits. They would, thus, request renegotiation in order to balance the economy of scale or restore the economic equilibrium of the contract to what it was at the conclusion of contract. In this respect, they want the contract to be economically viable.

Sometimes, foreign investors may demand the renegotiation of the contract terms when they face serious technical difficulties in the development of the project or the geological situation or any condition that has made the development of the project onerous or

[101] AL Faruque (n 4 above) 118.

[102] AL Faruque (n 4 above) 118.

[103] P Kuruk 'Renegotiating Transnational Investment Agreements: Lessons for Developing Countries from the Ghana-Valco Experience' (1991) 13 *Michigan Journal of International Law* 43. See also W A Stoever 'Renegotiations in International Business Transactions, Lexington Books' (1981) 345-47.

unprofitable. Now and then, foreign investors would demand renegotiation in order to increase their profit stake in the concession.[104] This was the case, for instance, in the Production sharing contract (Psc) between the Federal Republic of Nigeria and Chevron Texaco. The investor in this case requested a renegotiation in 2001 to accommodate a 70:30 profit split for 350,000 barrels of profit oil. [105]

Renegotiation is not always a uni-directional process which is tailored to benefit either the host country or the investor.[106] Occasionally, both parties may invoke renegotiation for the realisation of 'their mutually reinforcing economic interest of the project, for preserving good future relationship and maintaining their reputation in the global market place'.[107]

3.9 Benefits of renegotiation clauses

Long-term concessions are frequently concluded on the basis of speculative data. At the entry of such contracts, it is not certain what the quality of the resource is or how competitive its price. It is for these reasons that it is in the best interest of the host country and, indeed, the investor to enter into concessions with a flexible and amendable approach. Flexibility and amendable concessions enable parties to make adjustment in the contractual relationship to heed national and international, environmental, economic and political changes. Additionally, a flexible and amendable contractual regime enables parties to readjust to changes of circumstances that may have economic effects on the concession. In this way, the host country would not be constrained from exercising its legislative prerogatives. As such, the host state will not unilaterally change its fiscal policies or laws but will, firstly, seek renegotiation with the investor on how best the contractual terms may be adjusted.

Foreign investors, however, perceive the insertion of flexible clauses in concessions as an impediment to contractual stability. There is, therefore, always a conflict between contractual stability and flexibility as established in our discussions above. Likewise, Asante explained that:

> A major source of conflict between host governments of developing countries and transnational corporations derives from the preoccupation of transnational corporations with stability and

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[104] AL Faruque (n 4 above) 118 - 119.

[105] 'News in brief' *Petroleum Economist* 1 January 2002 43.

[106] AL Faruque (n 4 above) 119.

[107] AL Faruque (n 4 above) 119.

> predictability in contractual relations on the one hand, and the demands of host governments for a more flexible contractual regime on the other.[108]

The above notwithstanding, the use of renegotiation techniques in concessions brings about stability. Stability is achieved in the sense that, whereas host governments in cases of stabilisation clauses would modify or alter the terms of the contract unilaterally, the same cannot be done where a concession has a renegotiation clause. This is because a renegotiation clause obligates the host government to renegotiate the terms of the contract in the event that supervening circumstances occur.[109] In this sense, the host country will not unilaterally alter or modify the terms of the concession to the detriment of the foreign investor. In this way, stability of contract is achieved. Renegotiation clauses can, thus, bring about both efficiency and flexibility to a concession.[110] As a result, the rationale of renegotiation clauses is:

> to protect the company not by freezing the contractual regulation, but conversely by making the agreement flexible and amendable throughout its duration, in case the economic circumstances of the agreement change by a "sovereign act.[111]

The other benefit of renegotiation clauses is that they satisfy the host country's sovereign rights.[112] Unlike stabilisation clauses which infringe on the sovereign prerogatives of the host country, renegotiation clauses merely obligate the parties to revise their contractual relationship in the case of supervening circumstances beyond their control.[113]

3.10 Renegotiation in the absence of a specific renegotiation clause

Most of the long-term concessions contain express provisions for renegotiation and adaption clauses as a safeguard to enable parties to deal with an onerous event should the same happen in the future. There are, however, instances where a concession does not have an express provision for renegotiation and adaptation clauses. Renegotiation and adaptation in the absence of a specific provision for renegotiation and adaptation clauses poses a great deal of trouble. Scholars seem to hold divergent views on the subject.

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[108] SKB Asante 'Stability of Contractual Relations in the Transnational Investment Process' (1979) 28 *International and Comparative Law Quarterly* 404.

[109] Bernardini (n 69 above) 103.

[110] Al Qurashi (n 27 above) 267.

[111] Berger (n 56 above) 1361.

[112] Al Qurashi (n 27 above) 265.

[113] Bernardini (n 69 above) 103.

One school of thought contends that, without renegotiation and adaption clauses inserted in a contract, contracting parties cannot renegotiate the terms of the contract.[114] They premise their argument on the fact that there is no independent legal obligation to renegotiate in the absence of a specific agreement. According to this school of thought, renegotiation can be possible only if there is a specific legal framework in the concession to support a renegotiation process. Without such a legal framework, any renegotiation done will be null and void.

Another school of thought argues that renegotiation and adaptation are achievable even in the absence of any specific framework provided in the contract.[115] They base their contention on the fact that renegotiation is inherently a natural consequence of the nature of long-term concessions. This school of thought further argues that renegotiation will be possible by looking at the other provisions of the contract or applicable law that may by implication provide for it.[116] This may provide a suitable starting point.[117] Such provisions include, but are not limited to, hardship clauses, *force majeure* and the applicable law of contract.[118] It should be noted that contracting parties can always decide to renegotiate their concession, even in the absence of a renegotiation clause.[119]

3.10.1 Other contractual terms consideration

In the absence of an express provision for renegotiation, contracting parties may resort to looking at other provisions in the contract that may facilitate renegotiation as an appropriate starting point.[120] In such cases, the parties can look to *force majeure* and hardship clauses to trigger renegotiation.

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[114] AL Faruque (n 4 above) 130.

[115] M Sornarajah 'Supremacy of the Renegotiation Clause in International Contracts' (1988) 5 *Journal of International Arbitration* 97-114.

[116] Berger (n 56 above) 1350.

[117] N Horn 'Changes in Circumstances and the Revision of Contracts in Some European Laws and International Law (1985) 18-19; Berger (n 56 above) 1350; W Peter 'Arbitration and Renegotiation of International Investment Agreements' (1995) 240.

[118] Berger (n 56 above) 1350.

[119] Horn (n 117 above) 18 -19.

[120] Horn (n 117 above) 18- 19.

(i) Force Majeure clauses

Force majeure clauses would give parties time to revise the contractual terms before resorting to a cancellation of the concession.[121] Occasionally, a *force majeure* clause may contain an obligation for the contracting parties to renegotiate the terms of contract.[122] The cancellation of the concession is usually the last resort and it is discouraged owing to the huge capital injection in the project.[123]

(ii) Hardship clauses

Hardship clauses, on the other hand, are meant to maintain the contractual economic equilibrium that exists between the parties[124]. It is triggered only when a party has reached the limit of sacrifice or poses a party excessive economic imbalance. It can also be triggered where the performance of the concession becomes extremely onerous. As a legal consequence of the hardship, the contracting parties are obliged to renegotiate the terms that are causing the hardship for the other party. In this way, a hardship clause is perceived as an avenue for making a contract flexible and so permitting parties to renegotiate the terms of the contract.

Although the concepts of *force majeure* and hardship are starting points to trigger the renegotiation of a burdensome concession, in reality they do not bring about renegotiation.[125] This is because the hardship and other onerous things are usually introduced by the host country through legislation. The host government will, therefore, not be willing to renegotiate the provisions of the concession on the premise of the things it has itself caused. In the event that the contracting parties fail to reach an agreement, the dispute will be referred to international arbitration. The international arbitration tribunal is usually reluctant to interfere with the terms of the contract. The foregoing can be demonstrated by the position

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[121] Berger (n 56 above) 1350.

[122] AL Faruque (n 4 above) 135.

[123] Berger (n 56 above) 1350.

[124] Berger (n 56 above) 1350.

[125] Berger (n 56 above) 1353.

that the tribunal took in an *ad hoc* arbitration of *Himpurna California Energy Ltd v PT. PLN (Persero)*[126] when it observed that:

> "It is not for the Arbitral Tribunal to question the motives or judgement of the Parties, but to assess their rights and obligations in light of their legally significant acts or omissions. That is all; that is enough. To go beyond this role would be to betray the legitimate expectations reflected in the Parties' agreement to arbitrate, and indeed to impair the international usefulness of the arbitral mechanism....The arbitrators cannot usurp the role of government officials or business leaders. They have no political authority, and no right to presume to impose their personal view of what might be an appropriate negotiated solution. Whatever the purity of their intent, arbitrators who acted in such a fashion would be derelict in their duties, and would create more mischief than good. The focus of the Arbitral Tribunal's inquiry has been to ascertain the rights and obligations of the parties to the particular contractual arrangements from which its authority is derived".[127]

Here the tribunal took the view that the sanctity of contract takes primacy over changes in the surrounding economic conditions.

3.10.2 Applicable law consideration

Another consideration that the parties may explore in an instance where the concession does not have an express provision for renegotiation is to look at an agreed applicable law clause in concession. The law that is applicable to the concession is very critical with regard to the consideration of how a party may deal with a hardship to a concession without a renegotiation clause.[128] It governs how the contracting parties will conduct their affairs in the event of a change in circumstances that disturbs the economic equilibrium. Additionally, it will regulate what will happen in an instance where the parties fail to negotiate or where negotiations are stifled by reason of one of the contracting parties refusing to cooperate in the process.

It is a well-established principle of international investment law that contracting parties have the prerogative to determine the law that will regulate their business relationship.[129] The contracting parties may choose international law or national law of

[126] UNCITRAL Award of May 4 (1999) 25.

[127] UNCITRAL Award of May 4 (1999) 25.

[128] Al Qurashi (n 27above) 269.

[129] J Lew *Applicable Law in International Commercial Arbitration* (1978) 75. See also G Delaume *Transnational Contracts: Applicable Law and Settlement of Disputes* (1988) 2-3; K Böckstiegel Arbitration *and*

another state as the law that will govern their concessional relationship. Nonetheless, there is some disagreement among scholars as to whether "public international law rules and principles alone can govern all aspects of the contractual relationship between a government and a foreign company".[130] In this respect, Arbitral tribunals are obliged to apply the law that the contracting parties have agreed on. It is important to note that the host government's domestic law may equally "be applicable, though subject to international law, if the agreement provided for arbitration under the International Centre for the Settlement of Investment Disputes".[131] In other instances, the contracting parties would choose the applicable law to be a combination of both national law and international Law.[132] The foregoing is usually a compromise where the contracting parties fail to agree on a system of law to be the governing law.[133] This normally poses many difficulties for an arbitral tribunal. In its attempt to resolve the matter, an arbitral tribunal will look at the similarities in all the legal systems and apply the same as the governing law. This section will focus primarily on common law and civil law legal systems to see how the issue of a change of circumstances is dealt with.

(i) Common law

The common law system has a traditional and rigid approach with regard to contract law. It upholds the absolute adherence to observance of contractual terms. Sanctity of contract is, thus, paramount under the common law system. Consequently, contracting parties must strictly observe the contractual terms however onerous such terms might be. In addition, the common law regime does not allow the arbitral tribunals and courts to interfere with the contractual terms in order to reflect the change of circumstance that affect the concession.[134]

State Enterprises: A Survey on the National and International State of Law and Practice (1984) 28; W Craig and all *International Chamber of Commerce Arbitration* (1990) 301.

[130] W. Friedmann 'Some Impacts of Social Organisation of International Law' (1956) 50 *The American Journal of International Law* 484.

[131] Article 24 of the International Centre for the Settlement of Investment Disputes.

[132] Al Qurashi (n 27 above) 269.

[133] K Böckstiegel 'States in the International Arbitral Process' (1986) 2 *Contemporary Problems in International Arbitration* 274.

[134] R Goode *Commercial Law* 2nd edn (1995) 140.

Despite the abovementioned, the common law system does recognise the principle of frustration of the contract. A concession is said to be frustrated if there is a supervening event that makes it impracticable to perform the obligations enshrined therein. In the same vein, Al Qurash observed that:

> Frustration of the contract may be brought about when the performance of a contract becomes physically or legally impossible, or when the performance is possible but only in a very different manner from that originally contemplated, without fault of either party.[135]

It is worth noting that English Courts, in very exceptional circumstances, will excuse a party from performing its contractual obligations owing to a contract frustration. The exceptional circumstances include situations such as adverse economic changes or serious hardship. The court will, however, not tolerate mere hardship. The courts seem to be very reluctant to grant the relief of frustration of the contract. As noted by one commentator, 'the English doctrine of frustration as currently applied is too strict and narrow to produce that degree of adjustment which the commercial community would regard as fair'.[136]

The United States of America practice unlike its English counterpart, takes a more liberal approach regarding the doctrine of contract frustration. In terms of the United States of America practice, the approach to frustration of the contract is known as commercial impracticability and embodied in section 2-615 of the Uniform Commercial Code and section 268(2) of the Restatement (second) of contracts.

Under the commercial impracticability concept, relief for non-performance may be granted from "excessively burdened performance such as severe shortage of raw materials or unforeseen shutdown of major sources of supply and also in such cases parties can request renegotiation".[137] Although the United States of America law acknowledges lack of performance of contractual obligations owing to commercial impracticability only in very exclusive circumstances, the courts have even adjusted the contractual terms to cure the hardship. In addition, the

[135] Al Qurashi (n 27 above) 270 – 271. See also Goode (n 134 above) 141.

[136] Al Qurashi (n 27 above) 270 – 271. See also Goode (n 134 above) 141.

[137] Al Qurashi (n 27 above) 271. See also WF Fox *International Commercial Agreements: a Primer on Drafting, Negotiating, and Resolving Disputes* (1998) 217.

United States of America practice also recognises the renegotiation of long-term concessions only in instances of extreme unexpected onerous events.

(ii) Civil law

The German law recognises the principle of the sacredness of contract. Even so, German law caters for relief from contractual "performance in cases of impossibility without fault on either side".[138] Moreover, German courts have framed a general doctrine on contract reconsideration where there is a failure of the underpinning of the concession. The doctrine is known as the *Wegfall der Geschäftsgrundlage*.[139] The foundation of this principle is premised on the concept of good faith which serves as the source of German contract law as stipulated in article 242 of the German Civil Code.[140] This doctrine stipulates that a concession may be adapted or terminated in a situation of "uncontrollable change in the circumstances surrounding the contract that leads to a fundamental disequilibrium in the contract and puts an undue burden on the party who had not anticipated and accepted that risk in the contract".[141] In this regard, German courts will not tolerate merely an onerous or change in risk basis for exemption from performing the contractual obligations.[142]The legal significance "of the collapse of the foundation of the contract is that the parties are obligated to negotiate on adaptation in good faith, and in certain cases, and not always, the court can adapt the contract".[143]

The French law upholds the principle of the sanctity of contracts.[144] A contracting party may be excused from performance of its contractual obligations only in cases of impossibility, mainly by reason of *force majeure*. If there is a contractual clause to the contrary this will, however, not be possible. *Force majeure* is defined as being any event that is unforeseeable which renders the

[138] Ng'ambi (n 3 above) 141.

[139] Al Qurashi (n 27 above) 272.

[140] Goode (n 134 above) 191.

[141] Horn (n 117 above) 18- 19.

[142] R Kunth *Contract Adjustment in Energy Law* (1986) 201.

[143]Al Qurashi (n 27 above) 272.

[144] Ng'ambi (n 3 above) 141.

performance of the contract impossible. Furthermore, it is trite that one has to show that the existence of such unforeseeable event is not a result of the fault of either party, and a simple change in the circumstances is not enough reason to break away contractual performance.[145] The latter is a very strict position, but it has been made more manageable by Article 1134 and 1135 of the French Civil Code requirements of good faith.

The doctrine of *'imprévision'* is developed by the French Conseil d'Etat. This is in connection with agreements entered into with governments or public bodies.[146] The principle is important for an international long-term concession, because such contracts are mostly entered into with states and/or state enterprises.[147] This doctrine affords the courts the chance to adapt a contract in instances where the economic evenness of the concession is affected adversely by an unforeseen change of circumstances.[148] It further permits the cancellation of a concession only if the change affecting the economic equilibrium is final and cannot be remedied.[149]

3.10.3 International law consideration

As discussed earlier above, under international law, the principle of change of circumstances or *rebus sic stantibus* is well celebrated or widely accepted. It should be noted that the above principle applies to concessions whether they have a renegotiation clause or not. This principle is embodied in Article 62 of the Vienna Convention on the law of treaties. The above provision permits parties to be excused from the performance of their obligation in the event of hardship. Nevertheless, the treaty will permit parties to withdraw or seek renegotiation only in exceptional circumstances. This is meant to curb abuses of the treaty provisions which may lead to contractual uncertainty. The foregoing is the view that was

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145 A Puelinckx 'Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmüglichkeit, Changed Circumstances: A Comparative Study in English, French, German and Japanese Law' (1986) *3 Journal of International Arbitration* 47.

146 Al Qurashi (n 27 above) 273.

147 Kolo and Walde (n 18 above) 36.

148 Al Qurashi (n 27 above) 273.

149 Ng'ambi (n 27 above) 141.

shared by the International Court of Justice (ICJ) in the case concerning the *Gabcikovo-nagymaros project (Hungary v Slovakia)*.[150]

3.11 Contract with a renegotiation clause

Mostly, a concession will include a renegotiation clause which may be triggered only when certain conditions are met. This potentially poses serious challenges as the application of these clauses does not automatically apply. Great care must, therefore, be taken in drafting these clauses in order to avoid ambiguities. For, as Bernardini rightly notes, a workable renegotiation clause must clearly deal with the issues below:

> "(a) the change of circumstances triggering the renegotiation;
>
> (b) the effect of the change on the contract;
>
> (c) the objective of the renegotiation;
>
> (d) the procedure for the renegotiation; and
>
> (e) the solution in case of the failure of the renegotiation process."[151]

The above issues need to be addressed clearly in order to avoid any uncertainties when an event that triggers renegotiation occurs. The paper has discussed most of the above points that are expected to be included in a renegotiation clause in the preceding paragraphs.

3.11.1 Definition of triggering events

A trigger event is a pointer that enables the contracting parties to request renegotiation. Most problems surrounding renegotiation arise from identifying trigger events. A precise definition of a trigger event is, thus, imperative and brings about contractual stability and flexibility. Trigger events may include financial risks, political risks, a fall in metal prices, an increased stake by the host state in the profits, etc. An imprecise definition of a triggering event may lead to ambiguities and a wide interpretation of what events may be trigger events for purposes of renegotiation. n imprecise definition may, thus, bring instability to the contracting relationship between the parties

There are rules that are associated with a renegotiation process. These rules are usually not clearly stipulated in the renegotiation clause. The first rule states that "original equilibrium of the contract should be maintained and therefore neither party should be

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[150] 37 I.L.M. 162 (1998).

[151] Bernardini (n 69 above) 103.

allowed to profit or be forced to suffer a loss as a result of the renegotiation."[152] The second rule is that contracting parties must take the process seriously as it is a contractual obligation. The parties must have the willingness to listen to each other's demands and be flexible to surrendering certain demands in order to reach a compromise. The third rule is that the parties must realise that the purpose of the renegotiation process is restricted to the changed circumstances and not an adaptation of the whole contract unless the contrary is specifically agreed.

3.11.2 Failure to renegotiate

According to undisputed international opinion, the duty to renegotiate is one premised on the best efforts to reach an agreement.[153] As such, parties must do everything within their best efforts to come up with a successful renegotiation in good faith but they are not obligated to reach an agreement.[154] Consequently, the obligation to renegotiation would still be fulfilled even if the parties fail to reach an agreement. This is because, as one commentator has contended, the obligation to renegotiate is satisfied when the parties actually renegotiate and not when an agreement is reached. The said commentator further stated that a renegotiation clause results in "process-oriented instead of success-oriented contractual obligations of both parties".[155] Failure to reach an agreement is not a breach of contract unless the contrary is shown to prove otherwise.

3.12 Conclusion

This chapter has highlighted the nature and legal status of renegotiation and adaptation clauses in establishing efficiency and flexibility in long-term mining contracts. It has also argued that the renegotiation of long-term concessions is possible whether or not such a concession contains renegotiation and adaptation clauses. This chapter has equally established that the duty of the parties in a renegotiation process is to negotiate but that they are not obliged to reach an agreement. In this view, the contracting parties must take the negotiation process seriously and do their best to reach an agreement. It has been noted, further, that failure to reach an agreement does not amount to a breach of contract because the obligation on the parties is to renegotiate the concession and not to reach an agreement. If a

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152 Horn (n 117 above) 28.

153 Berger (n 56 above) 1368.

154 Berger (n 56 above) 1368.

155 Berger (n 56 above) 1368.

party, however, refuses to renegotiate the terms of the concession, it would then be in breach of contract because renegotiation is a term of contract. The study will now turn to examine the Zambian tax mining regime after the privatisation of Zambia Consolidated Copper Mines.

CHAPTER FOUR

ZAMBIAN TAX MINING REGIME AFTER THE PRIVATISATION OF ZAMBIA CONSOLIDATED COPPER MINES

4.1 Introduction

In the previous chapters, this study has looked at the theories regarding how well a mining concession may be insulated from different kinds of risks, such as political, economic and environmental risks. In chapter two, the paper examined the nature and legal efficacy of stabilisation clauses as a viable instrument for managing political risks. The paper also established that, although stability clauses do provide a concession with efficiency, they are very rigid and usually interfere with the sovereign legislative prerogatives of the host country. Because of the flaws associated with stability clauses, the paper discussed renegotiation and adaptation clauses in chapter three. These clauses provide a safeguard mechanism that gives a mining concession security through a flexible and amendable approach in the event of changes in circumstances beyond the control of the contracting parties.

This chapter discusses the Zambian tax mining regime after the privatization of Zambia Consolidated Copper Mines (ZCCM). It focuses on the key features of the 2008 tax mining legislative and fiscal regime of Zambia as amended in 2009. Furthermore, it shows how the above differs from the core features of the fiscal regime stabilised in favour of mining companies through the cancelled mining development agreements. The chapter also discusses how the Zambian government has continued to change its tax mining fiscal regime with total disregard to the stabilization clause contained in the different mining concessions entered into in the 2000s. The chapter will discuss the above in the light of the Stability and Renegotiation clauses in order to find an efficient and flexible approach to the tax mining regime in Zambia.

4.2 Brief history of mining regime in Zambia

Zambia is one of the main producers of copper worldwide, and, after the Democratic Republic of Congo, the second largest producer of copper in Africa.[1] Additionally, Zambia is

[1] https://www.german-energy-solutions.de/GES/Redaktion/DE/Publikationen/Marktanalysen/2016/studie_2016_subsector-solar-in-mining-zambia.pdf?__blob=publicationFile&v=6 . (accessed 25 March 2017)

a mono-economy depending heavily on mining resources as a source of economic survival.[2] Copper Mining and, indeed, mining in general, in Zambia plays a significant role as it contributes critically to Government revenue as well as to the creation of formal employment either directly or indirectly. According to the World Bank report dated 17 July 2016 couched as *'How can Zambia benefit more from mining,'* "it accounts for 12% of the economy's Gross Domestic Product (GDP) and 70% of total export value."[3] Zambia's economy, thus, relies heavily on mining as one of its fundamental growth pillars.

Copper mining in Zambia has undergone three stages which neatly follow the path of its political transition. Immediately after she gained her independence, Zambia was a multi-party democratic state. In 1975, she ceased to be a multi-party democracy and became a one-party participatory democracy. In 1990, however, she reverted to a multi-party democratic system of governance. It is this same political pattern that the copper mining regime in Zambia followed.

4.2.1 Zambia's mining regime after colonialism

The first stage was an error immediately after colonialism and the aftermath of independence. During this stage, the mining regime in Zambia was in private hands. The mining industry was mainly in the hands of Roan Section Trust (RST) and Anglo America Corporation (AAC). It is worth noting that, during this period, mining rights were vested in the British South African Company and so consequently mineral royalties accrued to the company.[4] In 1969, however, the then Zambian administration, under President Kenneth Kaunda, "through the Matero reforms obtained [a] majority shareholding in the mining companies. Mineral rights also reverted to the state".[5]

4.2.2 Zambia's mining regime during the one-party state

The second stage was reached when then President of Zambia, Kenneth Kaunda, and his administration expropriated the assets of the RST and AAC. The two mining giants were

[2] SP Ng'ambi *Resource Nationalisation in International Investment Law* (2016) 99.

[3] http://www.worldbank.org/en/news/feature/2016/07/18/how-can-zambia-benefit-more-from-mining . (accessed 25 March 20017)

[4] J Lungu 'The Politics of Reforming Zambia's Mining Tax Regime' (2009) 8 *Southern Africa Resources Watch* 11. http://www.sarwatch.org/sarwadocs/Politics_Reforming_Zambia_Mining_Tax_Regime.pdf (accessed 19 March 2017)

[5] Lungu (n 4 above) 11. See also Kaunda Kenneth *Towards complete independence* (1969) 1- 9.

nationalised under the philosophy of humanism and were then incorporated into a single corporate body called ZCCM.

Between the 1980s and 1990s, the Zambian mining regime went through a tough time as it saw the collapse of copper prices on the world metal market.[6] The foregoing, coupled with the lack of investment in mining consumables and machinery, resulted in the under performance of the then State-owned Zambia Consolidated Copper Mines (ZCCM). In fact, the state-owned mines started making serious losses of up to US$ 1 million per day which meant a reduction in the Zambian Government revenues.[7] This resulted in the company's going from being a prized asset to being a loss-making company and, thus, a burden on the Government treasury. Consequently, this forced the Government to privatize the mines.

4.2.3 Zambia's mining regime during privatisation

In 1990 the Kenneth Kaunda government changed from being a one-party state to becoming a multi-party democratic state. This was due to internal political pressure in the country coupled with the conditions for loans by the World Bank and International Monetary Fund (IMF). The World Bank and the IMF pressurised the then Zambian government to privatise the mining as they were a strain on the government treasury.

In 1990, the Kenneth Kaunda government was defeated in a general election that saw the Movement for Multi-Party Democracy (MMD) coming to power. One of the MMD's campaign promises was that it was going to liberalize the economy. It further promised to sell the mines to foreign investors.

In 1996, Zambia had qualified for the World Bank's Heavily Indebted Poor Country (HIPC) initiative. This meant that she would have some debt relief if she cleared some of her hurdles.[8]Under the HIPC completion scheme, Zambia received more pressure to privatize the mines. In addition, it was a condition precedent under this scheme that Zambia was obligated to establish a liberalised mining policy that was meant to attract foreign investors.[9] To facilitate the process of attracting foreign investors in Zambia, the government enacted the

[6] J Lungu 'Copper Mining Agreements in Zambia: renegotiation or law reforms?' (2008) 35 *Review of African Political Economy* 404.

[7] Lungu (n 6 above) 404.

[8] Ng'ambi (n 2 above) 112.

[9] Ng'ambi (n 2 above) 112.

Mines and Minerals Act1995 and the Investment Act 1993.[10] Suffice it to note that the 1993 Act was repealed and replaced by the Zambia Development Agency Act 11 of 2006 as amended by Act 1 of 2010. So, privatization was in the third stage of the mining regime in Zambia.[11]

4.3 Entering into development agreements

As a result of the above, the Zambian government ventured into various development agreements with a number of foreign investors for the development of the mining sector in 1997 through to 2000. The development agreements were entered into on the basis of section 9 of the Mines and Mineral Act 1995. Under section 9(1 and (2) of the 2005 Act, it was enacted that:

> (1) For the purpose of encouraging and protecting large-scale investments in the mining sector in Zambia, the Minister may, on behalf of the Republic, enter into an agreement relating to the grant of a large-scale mining licence.
>
> (2) An agreement referred to in subsection (1) shall be known as a development agreement, and may contain provisions which notwithstanding the provisions of any law or regulation shall be binding on the Republic in relation to…

From the foregoing, Ministers were authorised by Parliament to enter into development agreements with foreign investors on behalf of the government. Undeniably, these development agreements were binding on the Republic of Zambia according to section 9(2) of the 1995 Act. Furthermore, all of the agreements contained tax stability clauses. Some of them, however, contained generally worded stabilisation clauses in addition to tax stability clauses. The best illustration of a tax stability clause is one contained in clause 14 of the development agreement that the Government of the Republic of Zambia (GRZ) signed with Cyprus Amax Kansanshi Plc and couched in the following terms:

> "Taxation Stability
>
> 14.1 GRZ undertakes that it will not for a period commencing at the Effective Time and ending fifteen (15) years following the date the Company commences Normal Operations:
>
> > (a) increase corporate income tax or withholding tax rates applicable to the Company (or decrease allowances available to the Company in computing its liability to such taxes) from those prevailing at the date hereof; or
> >
> > (b) otherwise amend the VAT and corporate tax regimes applicable to the Company including without limitation those pertaining to the carry forward of losses from those prevailing on January 1 6 , 1997; or

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[10] KK Mwenda 'Legal Aspect of Foreign Direct Investment in Zambia' (1999) 6 Murdoch University Electronic Journal of Law. http://www.murdoch.edu.au/elaw/issues/v6n4/mwenda64nf.html.

[11] Lungu (n349 above) 405.

(c) impose new taxes or fiscal imposts on the conduct of Normal Operations,

so as to have, in each case, a material adverse effect on the Company's Distributable Profits or the dividends received by its shareholders.

GRZ further undertakes that for the same period, ending fifteen (15) years following commencement of Normal Operations, it will not:

(d) increase:

(i) the rate of royalty, royalty base, method of calculation, or terms of payment from that in effect in accordance with section 66 of the Act, prevailing at the date hereof at a rate not to exceed three per cent. (3%) of the netback value (as "net back value" is currently defined therein); or

(ii) import duty rates (including the IDF) applicable to the Company so as to result in the weighted average import duty rate (inclusive of the IDF) to which the Company is subject on the import of goods and materials required for Normal Operation and which would, at the date hereof, be exempt from customs and excise duties under Section 97(l) of the Act, above the level of five per cent (5%); or

(iii) import duty rates (including the IDF) applicable to the Company so as to result in the weighted average import duty rate (inclusive of the IDF) to which the Company is subject on the import of goods and materials required for Normal Operation and which do not fall under Clause 14.1 (d)(ii), above the level of twenty per cent (20%); or (iv) the rural electrification levy applicable to the company's purchases of power from the level applicable on the date hereof; or

(e) impose other royalties or duties on Normal Operations, so as to have a material adverse effect on the Company's Distributable Profits or the dividends received by its shareholders.

14.2 Upon expiry of the period specified in Clause 14.1, GRZ shall, in any event, ensure that no law, statute, regulation or enactment shall be passed or made which would discriminate against the Company in respect of any such matters as are referred to in Clause 14.1 or otherwise in its conduct of Normal Operations or any other circumstances under this Agreement when compared to other mining companies or joint ventures conducting similar operations on a scale equivalent to those conducted by the Company in Zambia provided that GRZ will be at liberty to pass or make my such law, structure, regulation or enactment to enable the performance or amendment of a development agreement entered into by it and another mining company or joint venture prior to the expiry of such period.

14.3 GRZ covenants to reimburse the Company (or, at its option, make offsetting changes in any law, statute, regulation or enactment applicable to the Company) to ensure the Company is fully and fairly compensated for any loss, damages, or costs incurred by it by reason of a failure by GRZ to comply with the provisions of Clauses 14.1 and 14.2."

The underlying motivation of this was to attract foreign investors to the mining sector in order to boost the then collapsing economy and also to fulfil some of the HIPC conditions. One of the incentives promised to foreign investors for investing in the sector was a tax stability period ranging from 15 to 20 years with an undertaking by government fully and fairly to compensate the investors in the event that it breached the tax stability clauses.[12] Others included relaxed exchange controls and safeguards against expropriation[13] and

[12] http://www.minewatchzambia.com . (accessed 22 March 2017)

[13] Section 35 of the Investment Act 1993.

externalization of funds without government restrictions.[14] Other incentives, included paying lower royalties and corporate tax.[15] On paper, the government of Zambia was prohibited from increasing taxes and enacting new tax laws during the stability period and this had material effects on the viability of the project.

It ought to be noted further that none of the development agreements contained either renegotiation or adaptation clauses. They, however, contained applicable law and *force majeure* clauses.[16] For instance, the development agreement between GRZ and Chibuluma Mines Plc contained applicable law provision and *force majeure* under clauses 20 and 21 respectively.[17]

There has been much gossip as to why the Zambian Government entered into these irregular development agreements in the first place. [18]The answer may lie squarely on the fact that Zambia was trying to attract foreign investors to invest in the mining sector that had collapsed owing to low copper prices in the world market. Consequently, the mines were basically operating at a loss.[19] The government, therefore, had to offer incentives that were attractive and competitive to multinational corporations which were very reluctant to invest in the country. Furthermore, many multinational corporations perceived Zambia to be an investment risk. The foregoing assumption was based on the fact that the Kaunda administration had, in the aftermath of independence, nationalised the RST and AAC which created fear among investors.

Nevertheless, in the year 2008, the Government enacted the Mines and Minerals Development Act 7 of 2008 which repealed and replaced the 1995 Act. The essence of this 2008 Act was to unbundle and render obsolete the various development agreements that had

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[14] Section 36 of the Investment Act 1993.

[15] Section 9 of the Mines and Mineral Act 1995.

[16] Mopani Development Agreement http://www.leejones.tk/mwz/MOPANI.pdf (accessed 26 September 2017) clauses 25 and 26. See also Konkola Coper Mines Development Agreement http://www.leejones.tk/mwz/KCM.pdf (accessed 26 September 2017) clauses 25 and 26; Chambishi Metal Plc Development Agreement http://www.leejones.tk/mwz/CHAMBISHI.pdf (accessed 26 September 2017) (accessed 26 September 2017) clauses 20 and 21.

[17]Chibuluma Development Agreement http://www.leejones.tk/mwz/CHIB.pdf (accessed 26 September 2017).

[18] Lungu (n 4 above) 18.

[19] Ng'ambi (n 2 above) 117.

been entered into by the government of Zambia in 1997 through to 2000.[20] This was achieved through section 160(1) of the 2008 Act which provided that:

> 160. (1) A development agreement which is in existence before the commencement of this Act shall, notwithstanding any provision to the contrary contained in any law or in the development agreement, cease to be binding on the Republic from the commencement of this Act.

The foregoing clearly made the development agreements not binding on Zambia. Critical to the new changes ushered by the 2008 Act were taxes which were adjusted upwards. Some of the changes in the fiscal regime for the mining companies included:

- "Increasing the corporate tax from the current 25 percent to 30 percent;
- Increasing the mineral royalty tax from the current 0.6 percent to 3 percent;
- Introducing a withholding tax on interest, royalties, management fees and payments to affiliates or sub-contractors in the mining sector at 15 percent;
- Introducing a variable profit tax of up to 15 percent on taxable income which is above 8 percent of gross income;
- Introducing a windfall tax to be triggered at different price levels for different base metals. For copper, the windfall tax will be 25 percent when the copper price is between $2.50 to $3.00 per pound or $2500 to 3000 per tonne; 50 percent when the price is between $3.00 and $3.50 and 75 percent when the price exceeds $3.50;
- Capital allowances which are currently at 100 percent will now be 25 percent. Capital expenditure for new projects shall be ring fenced and only become deductible when the projects start production; and
- The reference price on which these taxes will be based will be the price tenable at the London Metal exchange, Metal Bulletin or any other metal exchange market recognised by the Commissioner General of taxes."[21]

The aforesaid measures, according to then Minister of Finance, were expected to bring in an additional $415 million in revenue from the mining industry in 2008.[22]

As if the above were not enough, in the year 2015 the Government repealed and replaced the Mines and Minerals Act of 2008 by the Mines and Mines Development Act of 2015. This 2015 Act as was the case with the 2008 Act enhanced the taxes payable by the mines[23]. Under section 89 of the 2015 Act, the Government increased the payment of

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[20] https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/4133/pb7-mining+tax+in+zambia.pdf;jsessionid=FB14E366778B7ADF6FE07EE8FE9F9441?sequence=1 . (accessed 22 March 2017)

[21] Lungu (n 4 above) 19.

[22] Lungu (n 4 above) 19.

[23] http://www.manic.co.zm/wp-content/uploads/2016/11/Taxation-and-Mining-Investment-in-Zambia.pdf . (accessed 18 March 2017)

royalties on production minerals to 9%. By section 9 of the 2015 Act[24], the Government is empowered to "capture tax revenue immediately, even though the mine may still be several years from profitability – or may even be making a loss."[25]

This new development adversely affected the profitability of the mining sector which had already been hit by falling copper prices and a power deficit resulting from low-water levels in key hydro-power plants. As such, the mines retrenched most of their labour force and suspended production. This, in turn, meant an enormous reduction in revenue contributions to the Government and resulted in economic meltdown.[26] Nevertheless, there is now a proposal by government to introduce a new Mines and Minerals Development Act 2017 to help address the mining tax impasse.

The mining companies reacted to the measures that were taken government by reducing labour and scaling down operations. Some of the mines refused to comply with new tax regimes. First Quantum Mining company was the only one that commenced arbitration proceedings against the Zambian government but later on it withdraw the suit.

4.4 Breach of the development agreements

The measures that were taken by the Government of Zambia through the 2008 Act and the tax fiscal regimes in 2008 were in breach of the development agreements. As discussed in chapter two above, any breach of a stabilisation clause unquestionably renders the government liable to pay some form of monetary compensation to the injured foreign investor.[27] By inserting general stabilisation clauses and tax stability clauses in the development agreements, the Zambian Government created, for the benefit of the foreign investors, a legitimate expectation that it would honour its contractual obligations. And it

[24] The Mines and Minerals Development Act no. 11 of 2015.

[25] Royalties "are acknowledged to be a blunt instrument, in that they are not sensitive to market conditions, the cost profile, profitability or distinct circumstances of different mines. Royalties are regarded as a 'regressive' tax, as they fall hardest on those who are worse off. For example, two mines producing the same amount of copper will pay the same royalty, even though one may be producing at a loss, while the other is profitable". http://www.manic.co.zm/wp-content/uploads/2016/11/Taxation-and-Mining-Investment-in-Zambia.pdf (accessed 18 March 2017)

[26] http://www.sarwatch.org/sarwadocs/Politics_Reforming_Zambia_Mining_Tax_Regime.pdf (accessed 19 March 2017)

[27] E Oshionebo 'Stabilisation Clauses in Natural Resources Extraction Contracts: Legal, Econonic and Social Implications for Developing Countries' (2010) 10 *Asper Review of International Business and Trade Law 33*.

provided that, if it frustrated the expectation, it needed to compensate the foreign investors.'[28] It is practice in international arbitration that compensation awarded for breach of a stabilisation clause is usually in monetary form.[29] As one commentator rightly observed:

> . . . the clause (stabilisation clause) would be valid, binding and effective if it is read to mean an undertaking by the State to indemnify the investor for any loss he incurs as a result of an action or omission attributable to the former whatever the cause of such action or omission. Such undertaking does not infringe on its sovereignty.[30]

This payment of compensation would include the loss sustained (*damnum emergens*) and the payment of future profits (*lucrum cessans*).[31]The compensation to be paid would, furthermore, surely be ascertained by the arbitral tribunal since all the development agreements contained arbitration clauses.

The Zambian Government may have reacted maliciously in enacting the 2008 Act which cancelled all the development agreements she had entered into because she felt she was not benefiting from the agreements. This was as a consequence of the rigid nature of the stabilisation clauses. Furthermore, subsequent to the signing of the development agreements, the copper prices on the world market went high but yet the Zambian government could not benefit from such a rise. This was because she had negotiated lower taxes to attract investors. The above, coupled with pressure from the opposition parties and Non-Governmental Organisations who felt that the government was not benefiting from the development agreements and who called for the renegotiation of the agreements, led the government to act as it did. The 2008 Act was enacted in order to increase government's benefits from the mining sector.

4.5 Renegotiation of the development agreements in the absence of a renegotiation clause

The enactment of the 2008 Act and the introduction of the new tax regime in 2008 resulted in a serious conflict between the government and the mining companies. In 2009, copper prices fell owing to the financial crisis that hit the world. This serious affected the mining sector and

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[28]AFM Maniruzzaman 'Damages for breach of stabilisation clauses in international investment law: where do we stand today?' International Energy Law & Taxation Review (2007) 246 – 247.

[29] AFM Maniruzzaman (n 28 above) 247.

[30] A.Z. El Chiati, 'Protection of Investment in the Context of Petroleum Agreements' (1987) IV *Recueil des Cours* 164.

[31] A Faruque 'Validity and Efficacy of Stabilisation Clauses: Legal Protection vs Functional Value '(2006) 23 Journal of International Arbitration 330.

the mining companies threatened to reduce more labour and scale down operations further. This made the government remove the windfall tax which it had introduced in 2008.

The brutal approach that was taken by the government in 2008 by enacting a law that cancelled all the development agreements could have been avoided through the renegotiation of the agreements. The foregoing would have been possible even if the development agreements did not expressly provide for renegotiation and the adaptation of the terms of the agreement in circumstances of economic equilibrium. The performance of the obligations enshrined in the development agreements on the part of the government was definitely onerous.

As discussed in chapter three, a concession, such as the development agreements into which the Zambian government had entered, may be renegotiated when there is change of circumstances that affects the economic equilibrium of such an agreement. It was also established in chapter three that terms of a concession may be renegotiated even in the absence of an express provision of a renegotiation clause. In the absence of an express provision for renegotiation, contracting parties may resort to looking at other provisions of the contract that may facilitate a renegotiation as an appropriate starting point.[32] In such cases, the parties can look to *force majeure* and hardship clauses to trigger renegotiation.

In the case of Zambia and the mining companies, all the development agreements contain *force majeure* and applicable law clauses. These would form a starting point for the renegotiation of the development agreements. A cursory look at the *force majeure* clauses contained in the development agreements shows that parties are permitted to renegotiate the terms of the contract in the event of a change of circumstances. Furthermore, the applicable law clause in the development agreements provides that the applicable law is the law of Zambia and International law. As discussed in chapter three, under international law, the principle of change of circumstances or *rebus sic stantibus* is well established and widely accepted. It should be noted that the foregoing principle applies to concessions whether they have a renegotiation clause or not. This principle is embodied in Article 62 of the Vienna Convention on the law of treaties. The above provision permits parties to be excused from the performance of their obligations in the event of hardship.

[32]N Horn 'Changes in Circumstances and the Revision of Contracts in Some European Laws and International Law (1985) 18-19.

For a renegotiation process to be started there have to be some trigger events. In this case, for Zambia the trigger event was the fact that the development agreements were onerous on the part of government. The government was not benefiting from the agreements owing to an economic equilibrium that was unbalanced. The other trigger event was the fact copper prices had fallen on the world market yet the taxes payable by the mining companies were high. The aim then would have been to establish an economic equilibrium that would be beneficial to both parties.

It is important to note that there are cases in the world were concessions have been renegotiated in the absence of express provisions for renegotiation clauses. A case in point is the renegotiation of mining concessions in the Democratic Republic of Congo in 2000. The renegotiations were successful although hampered by impotence on the part of the representatives from government and corruption.

Once the development agreements are cancelled or remain cancelled by virtue of the 2008 Act, what is the legal basis of the relationship between the contracting parties? It is submitted that, legally, the cancellation of the development agreements meant that the parties ceased to have any contractual relationship. Practically, however, the parties have continued to be relating on the basis of the development agreement as modified unilaterally by the government in 2008. In this view, the action of the government in enacting the 2008 Act and the introduction of the 2008 tax fiscal regime was not to cancel the agreements but to vary the tax stability clauses. The effect of the section 160(1) of the 2008 Act was, thus, not to cancel the development agreement but to cancel the tax stability clauses so as to allow the government to change its tax mining regime. This is premised on the fact that the parties have continued to relate despite the effect of the 2008 Act. The fact that the parties have continued to relate contractually even after the effects of the 2008 Act does not mean that the government is not in breach of the tax stability clauses. There is, therefore, a need for the contracting parties to renegotiate the cancelled development agreements in order to adopt new terms that will formally regulate the parties' contractual relationship for the future.

4.5 Conclusion

This chapter has discussed the mining regime in Zambia and the changes it has gone through since independence. It has also shown that Zambia is a mono-economy which depends heavily on mining, particularly copper, as a source of revenue and employment. In this regard, the sector is jealously guarded by Government. The paper has also discussed that the

Government had entered into development agreements with different mining companies in 1997 through to 2000. The Zambia government had given the mining companies very generous incentives, such as low corporate and royalty taxes. This was done so as to attract foreign investors at the time when copper prices had fallen. Subsequent to the signing of the development agreements, copper prices went up but the government could not benefit from such an increase in prices as a result of the tax stability clauses that precluded government from changing its laws or tax fiscal policies. This resulted in the government's enacting the 2008 Act that cancelled all the development agreements she had entered with various mining firms. This was premised on the strength of section 160(1) of the 2008 Act. This led to mining firms scaling down operations and cutting down on labour. The paper has as shown that the Government breached the tax stability clauses by changing the tax laws and tax fiscal regimes in 2008 and as such it needed to compensate the mining firms. Compensation in this instance is in monetary form and includes actual loss suffered and payments of future profits. This could have been avoided by renegotiating the terms of the development agreements despite the fact that such agreements contained no provisions for renegotiation clauses. The chapter has established that the renegotiation of contractual terms is possible even in the absence of renegotiation clauses. The foregoing is possible by looking at the other provision of the concession and the applicable law. The chapter has shown that all the development agreements contained force *majeure* and applicable law clauses which could be used to facilitate renegotiation. The study will now turn to offer a recap of the study and make recommendations.

CHAPTER FIVE

GENERAL CONCLUSION AND RECOMMENDATIONS

5.1 Recap introduction

This chapter gives a summary of the whole study and makes findings of the research. It also offers recommendations on how the Zambian government and the foreign investor can best deal with the renegotiation of the cancelled development agreements.

5.2 Summary of findings

The aforesaid developments revealed that stabilisation clauses, though they bring about efficiency in long-term concessions, are very rigid and are a source of conflict between the contracting parties. This is because stabilisation clauses freeze the host country's power to make new laws or regulations that may have an impact on the contract. Such stability periods cover more than 15years. During the subsistence of these stability periods, the host government is precluded from making new laws and fiscal policies that may have benefits for the country. Consequently, host states find stability clauses infringe their legislative prerogatives which arise from their sovereignty. Inevitably, there is usually a conflict between the need for contractual stability and permanent sovereignty over natural resources. Discussions in chapter two have revealed that stabilisation clauses do not provide for flexibility in dealing with a change of circumstances that may make the performance of the agreement onerous. It has further been revealed in the discussions that there is need for a flexible, amendable and approachable contractual regime. This it has been revealed can be achieved by the insertion of renegotiation and adaptation clauses in long-term concessions.

The developments in chapter three have revealed that parties conclude long-term concessions premised on speculative assumptions, which may turn out to be untrue. This aspect validates the recourse to renegotiation clauses for permitting contracting parties to adjust the original contractual regime in case of deficiency or supervening of unforeseen events. Renegotiating an existing agreement is a common feature of international commercial transactions and certainly does not conflict with the stability of the contract. In fact, renegotiation brings about contractual stability by ensuring that the contracting parties both benefit from the concession through renegotiation and it curtails unilateral acts by the host state.

Nevertheless, to be operative, contracting parties should regulate renegotiation at the outset of their contractual relationship. In this respect, contracting parties must clearly define what events would trigger renegotiation. Not every event should give raise to the right to the revision or adjustment of terms of long-term concessions. This is because the choice of this flexible and amendable contractual approach may result in an unlimited demand for adaptation and result in contractual instability. Additionally, the discussions in chapter three have revealed that, even if a concession does not provide for a renegotiation clause, its adaptation is still possible so long as the applicable law regulates that issue. Furthermore, the absence of a precise clause regulating the interference of a third party may incumber this latter in adjusting or revising the contentious agreement on behalf of the parties.

With respect to Zambia's mining tax regime, the study has revealed that the government entered into development agreements with various mining firms when copper prices were very low on the world market. Furthermore, there was both external and internal pressure for entry into concessions with foreign investors on very generous and relaxed tax policies. External pressure basically came from the World Bank which made certain demands for the country to benefit from the HIPC scheme as the country had just qualified for the scheme. The government, through the auspice of the 1995 Act, granted foreign investors low corporate and royalty taxes with tax stability clauses. The study has revealed that, during the tax stability period, the government was precluded from changing its laws and tax fiscal regime. Immediately after entry into such agreements, copper prices went up by 400 per cent yet the government could not benefit from such a price increase. Consequently, the government enacted the 2008 Act which invalidated and cancelled all the development agreements. The study has revealed that the actions of the government were in serious breach of the development agreements into which it had entered. This brought about conflict between the contracting parties. This conflict would not have arisen had the parties renegotiated the terms of the development agreements, even though the same agreements did not contain renegotiation clauses.

The study has revealed that the renegotiation process can take place either where there is a renegotiation clause inserted into the concession or through applicable law. In the case for Zambia, the clause which parties can utilize is the applicable law clause which makes provision for the application of international law. The study has revealed that, under international law, the principle of a change of circumstances is a well-recognized principle. It allows a party to be exempted from the performance of contractual obligations in instances where such performance would be onerous to the party. The study has revealed that the performance of the obligations enshrined in the development agreements by the government was onerous. This flexible and amendable approach to contract should be pursued by the parties.

5.3 Conclusion

This dissertation has examined the renegotiation of long-term concessions in Zambia. It has aimed at adding academic value as well as informing policy makers and investors with respect to factors that ought to be taken into account in renegotiating an existing agreement. To this end, this study intended to consider what major legal systems, what arbitral awards and what scholars have to say about stabilisation and renegotiation clauses. It has also discussed what scholars and academics say about renegotiating an existing concession the provisions of which do not provide for such a flexible mechanism and the consequences in the case of a failure to agree. The dissertation also envisaged assessing the route the Zambian government and the mining companies could embark on if they were to renegotiate the terms of the development agreements that are onerous.

Following the introductory considerations developed in chapter one, the second chapter of this study discussed the nature and legal efficacy of stabilisation clauses. It has been shown that foreign investors insist on the insertion of stabilisation clauses as a mechanism to safeguard and to insulate their investments from risks, particularly from political risks. Stabilisation clauses aim at freezing the legislative powers of the host country from enacting laws or regulations that may have an adverse material effect on the concession. Chapter two of this study examined the fact that the insertion of stabilisation clauses in concessions tends to restrict or completely curtail exercise of its legislature prerogatives by the host country. This is a source of conflict between the host state and the foreign investors where the latter insists on contractual stability while the former insists on sovereignty. The chapter has also shown that the insertion of stability clauses in a concession does not preclude the host state from changing its laws or regulations contrary to its concessional obligations. The case in point is Zambia. In the Zambian situation, the government enacted the 2008 Act which cancelled all the development agreements into which she had entered. The chapter also showed how the international arbitration tribunals have dealt with the issue of a breach of stabilisation clauses and the compensation payable. It showed that a breach of stabilisation clauses results in the defaulting party paying monetary compensation to the injured party. This compensation may include a payment of actual loss sustained and future profits. The rigidity and flaws of stabilisation clauses led the study to look a flexible and amendable contractual approach in chapter three.

Chapter three discussed the nature and legal efficacy of renegotiation and adaptation clauses in long-term concessions. The chapter showed that parties conclude a long-term concession in the context of natural resources based on speculative assumptions about the geological area, input costs, output, rate of return, cost of compliance with the legal framework, labour, taxation rate and other parameters. It is improbable that these factors will turn out to be reality. Consequently, there is need to devise a mechanism for mitigating the hostile effect of the aforesaid assumptions. Unquestionably, contractual stability of the terms is important but a certain degree of flexibility is essential to permit contracting parties to revise or adjust their relationship in an event of contractual oversight inadequacies, cultural differences or the supervening of unpredicted events. Eventually, the salvage of the contractual relationship is the practical attitude in the mitigation of investment risks.

The chapter has indicated that the inclusion of renegotiation clauses in long-term concessions is the best way to achieving contractual flexibility in cases of supervening circumstances beyond the control of the parties but affecting the concession. It has also shown that the contracting parties may renegotiate the terms of the contract whether or not such a contract provides for renegotiation. In the event that the concession does not expressly cater for a renegotiation clause, contracting parties may resort to applicable law and *force majeure* clauses as a starting point to trigger a renegotiation process. Nonetheless, to be effective the technique of renegotiation must be fulcrumed upon some conditions which include the definition of the triggering events, the legal content of the obligation to renegotiate and its enforceability. It is important, in addition, to insert an arbitration clause in a long-term concession in order to strengthen a renegotiation clause.

The fourth chapter recalled the conditions surrounding the Zambian mining tax regime exploitation in DRC. It examined the three stages the mining regime in Zambia has gone through. The chapter has also shown that the Zambian government had entered into development agreements with different mining companies on very generous terms. Such terms included low royalty and corporate taxes, tax stability clauses, compensation for expropriation and expatriation of funds. These incentives were granted owing to external pressure from the World Bank and IMF, NGOs and the fact that the mines were collapsing owing to low copper prices. The chapter equally indicated that the Zambian government enacted the 2008 Act that cancelled all the development agreements into which it had entered. This prompted the mining companies to scale down operations and reduce labour. The chapter showed that the actions by the Zambian government were in breach of the tax stability clauses inserted in the development agreements. Furthermore, the chapter revealed that the best way to manage the conflict between the contracting parties was to renegotiate the terms of the development agreements. This could have been possible even in the absence of renegotiation clauses in the agreements. It also indicated that now that the development agreements have been cancelled, the contracting parties may renegotiate the revival of the concessions.

5.4 Recommendations

As was established earlier in chapter four, mining in Zambia is the number one driver of the economy. As such, the government and the mining companies must all approach their impasse in an amicable way. It is recommended that the contracting parties should enter into renegotiations with the view to readjusting their relationship and formally revamping the cancelled development agreements. This is the most amicable way of finding solutions that have for many years affected the mining industry. In line with the foregoing, it is further recommended that government should enact a law that would revamp the cancelled development agreements since the same were invalidated by statute. The renegotiation of the development agreements could still happen even if they do not contain renegotiation clauses. The starting point would be looking at the applicable law provision. It is recommended further that all future mining agreements in Zambia should contain renegotiation and adaptation clauses.

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